UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

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

Defendants Gale Norton, Secretary of the Interior, and Neal McCaleb, Assistant Secretary of the Interior for Indian Affairs, (collectively "Interior Defendants") submit this opposition to Plaintiffs' August 27, 2001 and October 19, 2001 motions for orders to show cause why various current and former government officials and attorneys should not be held in contempt in connection with this case. This brief is submitted on behalf of Secretary Norton, Assistant Secretary McCaleb and the other persons named in Plaintiffs' two motions, in their official capacities.[1]

[1] As set forth in the October 29, 2001 "Notice of Withdrawal of Current Counsel and Appearance of new Counsel for Defendants," undersigned counsel appear on behalf of Defendants with respect to the pending contempt motions only. Attorneys from the Department of Justice ("DOJ") Civil Division will respond separately to Plaintiffs' October 19, 2001 motion to the extent that it seeks to reopen Trial One to address whether a receiver should be appointed to take control of the Individual Indian Money ("IIM") accounts.

Even a cursory review of the voluminous record in this litigation reveals a long history of documented problems with the implementation of an accurate accounting of IIM accounts, as required by the American Indian Trust Fund Management Reform Act of 1994 ("1994 Act"). The reports of the Court Monitor, relied upon heavily in Plaintiffs' recent contempt motions, chronicle in great detail the continuing struggle of the Department of the Interior ("DOI") to carry out that accounting in a manner that is both prompt and accurate. Although DOI takes issue with a number of the conclusions drawn by the Court Monitor in his lengthy reports, his commentary undoubtedly sheds light on ongoing issues that must be addressed by DOI.

The present contempt motions, however, present a very different issue. Plaintiffs have asked that the Court hold no fewer than 39 current and former DOI and DOJ officials in contempt of court, and requested that each individual be imprisoned and sanctioned financially. See "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" ("Oct. 19, 2001 Contempt Motion"), at 16. Plaintiffs have alleged that invocation of the Court's contempt powers is appropriate because, in their view, the named DOI and DOJ officials have taken actions that constitute "an unprecedented fraud on this Court that plainly were designed to undermine the integrity of this judicial proceeding." Oct. 19, 2001 Contempt Motion, at 60-61; see also "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" ("Aug. 27, 2001 Contempt Motion"), at 24 ("this case has been derailed by fraud and abuse").

This brief will not attempt to address the long history of trust reform efforts or to chronicle in detail the actions that DOI officials have taken to bring about a workable accounting system. Whether DOI's actions in that regard are in conformity with law may properly be addressed under the governing legal standards set forth in the 1994 Act, the Administrative Procedure Act, and other relevant legal principles. In particular, Interior Defendants respectfully refer the Court to the November 14, 2001 filing from the DOJ Civil Division in this case, which outlines substantial changes to the structure of DOI's trust efforts reflecting Secretary Norton's continued commitment to trust reform, and directly responds to the Court's direction at the October 30, 2001 status conference in this case to explain "who is in charge of trust reform for the government." See Exhibit 1, Transcript of Oct. 30, 2001 Status Conference, at 43; Notice of Proposed Department of the Interior Reorganization to Improve Indian Assets Management (Nov. 14, 2001). This brief will instead address whether the actions of DOI and DOJ officials are in violation of clear and specific court orders so as to justify holding these individuals in contempt.

Based upon the existing record – including the reports and opinions of the Court Monitor and Special Master and the other available documentary evidence – an order to show cause simply is not warranted. Even accepting as true many of the concrete factual

assertions contained in the Court Monitor reports,[2] the record does not reflect conduct by Interior Defendants or their employees or counsel that might justify contempt. Rather, what this record reflects is genuine, determined and honest efforts by these individuals both to move trust reform forward and to document their progress for the Court. In light of the size and importance of the two tasks, DOI has undeniably struggled with how best to move forward. But contrary to Plaintiffs' suggestion, there is no reason to believe that contempt should be imposed.

As explained in detail below, the law governing the contempt sanction makes clear that it is a drastic remedy, to be imposed only where an individual violates a definite and specific court order requiring him to perform or refrain from performing a particular act or acts. The order in question must be clear and unambiguous, and the party moving for an order to show cause must articulate specific facts constituting contempt of a court order if proven. Plaintiffs' recent contempt motions in this case barely touch upon this core requirement of a clear and unambiguous court order, instead calling upon this Court to invoke its contempt powers for a wide range of conduct that is separate from any specific

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[2] The Court Monitor notes that his Reports are not evidence. See Exhibit 2, at 11. In responding to the individual Court Monitor reports, DOI has made clear that it contests a number of the assertions and conclusions contained therein. See, e.g., "Department of the Interior's Response to the Third Report of the Court Monitor," at 4 n.1. DOI has been hard at the task of implementing meaningful trust reform, and a response to Plaintiffs' motions would ideally include a comprehensive presentation of all facts regarding Plaintiffs' claims. As anticipated in Interior Defendants' filing of November 9, 2001, that has not proven to be feasible. Yet taking Plaintiffs' motions as Plaintiffs themselves have chosen to frame them, further factual development beyond that which is already a matter of record in this case is not necessary to the resolution of these motions, for when the facts of record are assessed against the governing law, it is clear that no show cause order should issue.

order. In addition, the motions are so broad both in their scope and in the number of individuals alleged to be contemnors that they fail to articulate an adequate basis for contempt as to each individual. For these reasons alone, the motions should be denied.

The specific factual allegations raised by Plaintiffs' motions also cannot support a contempt finding. Plaintiffs' allegations relating to the DOI Federal Register process on historical accounting methods, which is the primary factual basis for Plaintiff's August 27, 2001 contempt motion, are illustrative. The core of Plaintiffs' complaint with respect to this process is that Interior Defendants carried out a "sham" Federal Register process addressing how they might carry out a historical accounting in order "to delay indefinitely the resolution of this case and the Phase II accounting trial that defendants feared so much." See Aug. 27, 2001 Contempt Motion, at 20. But Plaintiffs' position on this point is fundamentally flawed on several different levels. First, to the extent that Plaintiffs may be read to suggest that the choice to utilize statistical sampling was itself inconsistent with this Court's December 1999 ruling, see Aug. 27, 2001 Contempt Motion, at 19-20, the plain language of that ruling and the Court of Appeals' decision show otherwise. This Court stated explicitly:

> It should be noted that the court is not ruling upon what specific form of accounting, if any, the Trust Fund Management Reform Act requires. For example, the court does not purport to rule on whether an accounting accomplished through statistical sampling would satisfy defendants' statutory duties.

Cobell v. Babbitt, 91 F.Supp.2d 1, 40 n.32 (D.D.C. 1999); see also Cobell v. Norton, 240 F.3d 1081, 1104 (D.C. Cir. 2001) ("The district court explicitly left open the choice of how the accounting would be conducted, and whether certain accounting methods, such as

statistical sampling or something else, would be appropriate"). In addition, the fact that DOI officials anticipated utilizing some form of statistical sampling as part of their efforts even before receiving public comments is not only not "bad faith," but it is consistent with the Administrative Procedure Act. DOI never hid from anyone that it believed that a transaction-by-transaction accounting of every account could be so time consuming and expensive as to be unrealistic. And the record also demonstrates that, contrary to Plaintiffs' suggestion, this was a genuine and purposeful process, designed to seek public opinion on the proper course for a historical accounting.

Plaintiffs' assertions to the contrary notwithstanding, the record also does not support a finding of contempt with respect to the manner in which DOI officials have reported to the Court their progress in trust reform efforts. The lengthy Second Report of the Court Monitor, for instance, chronicles in great detail many of the Court Monitor's concerns with respect to development of the TAAMS computer system. The Court Monitor offers harsh criticism of DOI's failure to recognize sooner the significant problems with this system. But there is a fundamental difference between failing to anticipate and recognize all the difficulties of this massive trust reform project, on the one hand, and disobeying court orders, on the other. And while Plaintiffs have noted several instances when, they suggest, DOI officials purposely sought either to mislead the Court or to hide from the Court problems that they knew existed with this system, the facts do not support such allegations of bad faith.

In short, there is no reason for an order to show cause because Interior Defendants' conduct does not suggest that contempt would be appropriate. A fair reading of the record

makes clear that, although one might complain about the pace of progress on the merits, contempt is unwarranted here, and no orders to show cause should issue.

ARGUMENT

I. Legal Standards

A. Civil Contempt

This Court undoubtedly has the inherent authority to enforce its orders through the exercise of its contempt powers. See Shillitani v. United States, 384 U.S. 364 (1966); Armstrong v. Executive Office of the President, 1 F.3d 1274, 1289 (D.C. Cir. 1993). That authority, however, is to be exercised sparingly, with "restraint and discretion." Chambers v. NASCO, Inc., 501 U.S. 32, 44 (1991). As this Court has noted, "the 'extraordinary nature' of the remedy of civil contempt leads courts to 'impose it with caution.'" S.E.C. v. Life Partners, Inc., 912 F. Supp. 4, 11 (D.D.C. 1996), quoting Ioshi 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, 659 F.2d 1173, 1184 (D.C. Cir. 1981). Without a clear and unambiguous court order, therefore, there can be no finding of civil contempt. See Armstrong, 1 F.3d at 1289. For this reason, the party moving

for an order to show cause has the burden of showing by clear and convincing evidence that: "(1) a court order was in effect, (2) the order required certain conduct by the respondent, and (3) the respondent failed to comply with the court's order." Petties v. District of Columbia, 897 F.Supp. 626, 629 (D.D.C. 1995); see also Life Partners, 912 F.Supp. at 11 (In order to be held in contempt of court, a party must violate "a definite and specific court order requiring [him] to perform or refrain from performing a particular act or acts with knowledge of that order."), quoting Whitfeld v. Pennington, 832 F.2d 909, 913 (5th Cir. 1987). If the order in question contains any ambiguities, the court has to resolve those ambiguities in favor of the respondent. See United States v. Microsoft Corp., 980 F.Supp. 537, 541 (D.D.C. 1997), citing Common Cause v. NRC, 674 F.2d 921, 927-28 (D.C. Cir. 1982).

In Armstrong, for example, several government agencies appealed from an order by Judge Richey holding them in contempt of a prior order enjoining the Archivist of the United States to "take all necessary steps" to preserve federal records and requiring the agencies not to remove, alter, or delete any information until the Archivist took action to prevent the destruction of federal records. See Armstrong, 1 F.3d at 1277. Because the agency did not violate a clear order requiring certain conduct, the Court of Appeals reversed and remanded. Id. at 1277, 1288-90. In holding that the District Court had abused its discretion, the Court of Appeals emphasized that "civil contempt will lie only if the putative contemnor has violated an order that is clear and unambiguous." Id. at 1289 (emphasis added), quoting Project B.A.S.I.C. v. Kemp, 947 F.2d 11, 16 (1st Cir. 1991).

A party charged with contempt is entitled to certain procedural protections. Due process concerns require that one charged with contempt be advised of the charges against

him and that he have a reasonable opportunity to defend such a charge. See, e.g., In re Oliver, 333 U.S. 257, 273 (1948); see also Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook R.R. Co., 380 F.2d 570, 581 (D.C. Cir. 1967) ("Like any civil litigant, a civil contemnor is . . . clearly entitled to those due process rights, applicable to every judicial proceeding, of proper notice and an impartial hearing with an opportunity to present a defense."). Thus, in order to initiate a contempt proceeding, the movant must set forth specific and detailed factual allegations that would constitute contempt of a court order if proven. See, e.g., Wyatt v. Rogers, 92 F.3d 1074, 1078 n.8 (11th Cir. 1996) (court should examine moving party's allegations to determine whether a case is sufficiently made out for an order to show cause); Philippe v. Window Glass Cutters League of America, 99 F.Supp. 369, 374 (W.D. Ark. 1951) (movant's accusation of contempt "should contain a short and plain statement of the grounds upon which the court's jurisdiction depends and on its face should show facts sufficient to constitute contempt of court"). A person cannot be punished for contempt not committed in the presence of the court without due and reasonable notice of the proceeding and the grounds upon which it is based. Philippe, 99 F.Supp. at 374.

The party seeking a finding of civil contempt has the "heavy burden of proof" of demonstrating, by "clear and convincing" evidence, that the respondent violated the court's prior order. See Washington-Baltimore Newspaper Guild v. Washington Post Co., 626 F.2d 1029, 1031 (D.C. Cir. 1980); see also Food Lion, Inc., 103 F.3d at 1016; Armstrong,

1 F.3d at 1289.[3] Moreover, the Court of Appeals has indicated that a party charged with contempt may defend itself on the ground of "good faith substantial compliance" with the court order. See Food Lion, 103 F.3d at 1017 & n.16 (assuming the existence of the defense); see also Cobell v. Babbitt, 37 F.Supp.2d 6, 9-10 & n.3 (D.D.C. 1999) (noting that, "[a]lthough the viability of this defense has not been squarely resolved in this circuit . . . the plaintiffs have not made such a challenge in this case."). To demonstrate good faith substantial compliance, the respondent may demonstrate that it "'took all reasonable steps within its power to comply with the Court's order.'" Food Lion, 103 F.3d at 1017 (citations omitted).

For the same reason, civil contempt against former government officials is disfavored. The primary purpose of civil contempt - to obtain compliance with a court order - is not furthered by holding former government officials in contempt, because they do not have the power to ensure compliance with the court order. See King v. Greenblatt, 489 F.Supp. 105, 108 (D.Mass. 1980) (former State officer could not be held liable for contempt because he has no power to control funds of any State agency); see also Shillitani, 384 U.S. at 371 (where grand jury has been finally discharged, a contumacious witness can no longer be confined since he then has no further opportunity to purge himself of contempt); cf. United States v. Bryan, 339 U.S. 323, 330 (1950) ("Ordinarily, one charged with contempt of a court order makes a complete defense by proving that he is unable to

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[3] On October 29, 2001, Plaintiffs filed a Notice of Supplemental Authority, in which they suggested that criminal contempt might be appropriate in response to conclusions of the Special Master relating to distribution of his anti-reprisal order. For the reasons set forth in Interior Defendants' November 9, 2001 response to the Special Master's October 28, 2001 supplemental opinion on this issue, no finding of civil or criminal contempt is potentially justified on this issue.

comply."). The same reasoning would apply to the many alleged contemnors who are attorneys no longer assigned to or working on this case, as they have no ability to bring about compliance with any Court order.

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. See SEC v. Bilzerian, 112 F.Supp.2d 12, 16 (D.D.C. 2000) (penalty only should be imposed after recalcitrant party has been given an opportunity to purge itself of contempt by complying with prescribed purgation conditions). This requirement stems from the remedial (as opposed to punitive) nature of civil contempt. See Food Lion, 103 F.3d at 1016 (unlike a criminal contempt proceeding, 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; see also Shillitani, 384 U.S. at 368-70. 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 1184-1185, 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.

B. **Court Monitor Findings**

Although not stating so explicitly, Plaintiffs' motions may be read to suggest that the assertions and conclusions of the Court Monitor may either be entitled to some form of deference or deemed legally established in this Court, to the extent that Interior Defendants have not specifically offered contrary evidence in responding to the Court Monitor's reports. See, e.g., Oct. 19, 2001 Contempt Motion, at 2 n.4; Factual Appendix I to Oct. 19, 2001 Contempt Motion, at 1 n.1; see also Transcript of Oct. 30, 2001 Status Conference, at 20 (In opposing Interior Defendants' motion for an enlargement of time, Plaintiffs' counsel stated, "They did not seek leave of this court, they did not file their comments, so neither Civil nor the United States Attorney's Office has any need for further time in that regard...").

If this is what Plaintiffs intend to suggest, they are incorrect. The order authorizing the Court Monitor's activities clearly and unambiguously states, "In any proceeding before this Court, Mr. Kieffer's findings of fact shall be reviewed de novo." See Cobell v. Norton, No. 96-1285 (D.D.C. Apr. 16, 2001), at 2; see also Transcript of April 16, 2001 Hearing, at 3-4 ("Mr. Kieffer's findings of fact will be reviewed by me de novo, so it's somewhat different than the appointment of a special master because he's being appointed by consent under the inherent authority of the court."). While the order does authorize the parties to "submit any objections or comments to the report" within 10 days of the date of notice of the order, the referral order does not state or suggest that a party is obligated to offer evidence to contradict a given assertion by the Court Monitor in order to preserve an objection to it.

II. Plaintiffs' Contempt Motions Lack the Requisite Specificity as to why Contempt Might Be Warranted for the Thirty-Nine Alleged Contemnors.

A. Failure to Specify Court Orders that Were Allegedly Violated

As the above discussion makes clear, the drastic remedy of contempt exists to punish knowing violations of clear and unambiguous court orders, where the alleged contemnor did not make a good faith effort at compliance. At the core of this doctrine, therefore, is the existence of a court order that someone is alleged to have violated. See Cobell v. Babbitt, 37 F.Supp.2d 6, 9 (D.D.C. 1999), citing Armstrong, 1 F.3d at 1289.

Plaintiffs' August 27, 2001 and October 19, 2001 motions devote precious little attention to either the existence or application of this fundamental requirement. For instance, the portions of both motions in which the legal requirements for contempt are set forth fail even to include an explicit statement that the requirement exists. See Aug. 27, 2001 Contempt Motion, at 17-18; Oct. 19, 2001 Contempt Motion, at 57-58. They also ignore the requirement that the order in question be "clear and unambiguous." Id. Plaintiffs instead emphasize the "considerable discretion" that a District Court enjoys when imposing sanctions generally. See Oct. 19, 2001 Contempt Motion, at 58, citing Perkinson v. Gilbert Robinson Inc., 821 F.2d 686, 688 (D.C. Cir. 1987). But nothing in the Perkinson decision - or any other controlling decision directly addressing the contempt remedy - suggests that this discretion undermines the unambiguous requirement that a contemnor has violated a Court order.

The portions of Plaintiffs' brief addressing the factual predicate for their motions also do not address adequately this core requirement. Their August 27, 2001 motion, for

also do not address adequately this core requirement. Their August 27, 2001 motion, for instance, relies primarily upon the charge that the Federal Register process undertaken during 2000 was a "sham" designed to avoid compliance with the Court's December 1999 ruling that DOI is obligated to carry out a historical accounting of IIM accounts. See Aug. 27, 2001 Contempt Motion, at 18-19 ("the Federal Register Process was a scheme orchestrated only to convince the Court and the Court of Appeals that defendants were supposedly acting to fulfill their fiduciary duty and this Court's orders to provide an accounting of 'all funds'"); id., at 20 ("scheme ... was contrived to justify defendants' failure to obey this Court's December 21, 1999 Order and to trick this Court and the Court of Appeals into permitting defendants to evade their duties even longer").

But the portion of the Court's December 21, 1999 ruling upon which Plaintiffs rely was a declaratory judgment that DOI has an obligation to carry out such an accounting. See Cobell v. Babbitt, 91 F.Supp.2d 1, 58 (D.D.C. 1999). Although the Court did issue several other remedial orders to remedy DOI's breach of its trust responsibilities, it specifically denied requests for prospective relief that were not affirmatively granted by that order. Id., at 59. The distinction drawn by this Court is an important one here, because noncompliance with a declaratory judgment cannot serve as a basis for contempt. See Armstrong, 1 F.3d at 1289-90. Quoting the Supreme Court's decision in Steffel v. Thompson, 415 U.S. 452, 471 (1974), the D.C. Circuit has held:

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

1 F.3d at 1290; see also Perez v. Ledesma, 401 U.S. 82, 125-26 (1971). This is not to suggest, of course, that DOI is free to ignore a declaratory judgment, but instead merely to note that it is only in response to the violation of a formal order that the drastic remedy of contempt may be imposed. As a result, even were Plaintiffs correct that the Federal Register process was not genuine - and it was, as discussed in detail in Section III below - it simply could not constitute contempt.

Plaintiffs' October 19, 2001 Contempt Motion is similarly vague about which orders they claim have been violated. For instance, this motion on at least two occasions lists a series of broad categories of improper conduct in which they claim DOI has engaged, including the charge of "routine violations of this Court's orders." Oct. 19, 2001 Contempt Motion, at 2-3; see also id., at 5-6. But while Plaintiffs cite in footnotes to the factual basis of their other charges, they conspicuously decline to provide any record evidence for this supposedly "routine" violation of Court orders.[4] Merely to point to the factual findings and conclusions of the Court Monitor - without tying those findings and conclusions to the core legal framework applicable to the drastic remedy of contempt - does not provide a sufficient basis for an order to show cause.

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[4] In fact, the only order specifically identified as having been violated in Plaintiffs' October 19, 2001 motion is the requirement that DOI submit quarterly status reports regarding trust reform efforts, which Plaintiffs claim was violated when DOI allegedly provided false or misleading information in those reports. See Oct. 19, 2001 Contempt Motion, at 59. Interior Defendants' response to this allegation is set forth in Section IV below.

B. Failure to Specify How Individual Contemnors Violated Specific Orders

As set forth in Section I above, an individual accused of actions that might constitute contempt has a due process right to know precisely the nature of the charges against him or her. See, e.g., Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook R.R. Co., 380 F.2d 570, 581 (D.C. Cir. 1967); Wyatt v. Rogers, 92 F.3d 1074, 1078 n.8 (11th Cir. 1996). At a minimum, this must include a specific articulation of the order the person is alleged to have violated and the proof that he or she has violated it.

In this case, Plaintiffs' pending contempt motions are so far-reaching in their scope that they fail to provide the necessary specificity as to how the individuals named as contemnors might be in violation of specific orders. Plaintiffs present a broad array of factual allegations and a long list of alleged contemnors, without explaining specifically what each individual has allegedly done that supposedly rises to the level of contempt of this Court. Although it is beyond the scope of this brief to address in detail the application of these legal principles to each named contemnor, a review of Plaintiff's "omnibus" motion of October 19, 2001 demonstrates the deficiency of that submission on this point:

- Fourteen of the thirty-nine named contemnors appear only one time in the text of the brief, in the long paragraph on pages 14-16, where the alleged contemnors are named without any substantive discussion of any actions they are alleged to have taken or orders violated.[5]

- An additional twelve of the named contemnors appear only two times in the text of the brief, once in the long paragraph on pages 14-16 and once elsewhere. Of these twelve:

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[5] John Berry, Sharon Blackwell, John Bryson, Michael Carr, Edward Cohen, Peter Coppelman, James Douglas, John Leshy, Hilda Manual, Chester Mills, Glen Shumaker, Anne Shields, Terrence Virden, and Daryl White.

- Five are mentioned in footnote 23 on pages 7-8 for having received some form of award or honor in connection with this case or their trust reform efforts.[6]

- Four are mentioned in footnote 34 on pages 14-15, in connection with the process adopted to verify the content of Quarterly Reports to the Court.[7] For the reasons set forth in DOI's response to the Fourth Report of the Court Monitor (filed separately today), that process plainly does not support a finding of contempt.

- Two are mentioned in footnote 27 on pages 9-10.[8] This footnote also addresses Plaintiffs' meritless charges with respect to the verification process for DOI's Quarterly Reports.

- One is mentioned in footnote 19 on page 6.[9] The individual is mentioned only as having been the author of a letter to the Special Master, in which it was represented that an assessment would be undertaken of the condition of tapes containing trust data.

- Six more of the individuals are mentioned three times in the brief, once in the long paragraph on pages 14-16 and twice elsewhere. Of these four:

  - One is mentioned in footnote 23 on pages 7-8 for having received an award, and on page 63 for having asked a question during Trial One.[10]

  - One is mentioned in footnote 23 on pages 7-8 for having received an award, and in footnote 34 on pages 14-15

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6 James Eichner, Charles Findlay, Jack Haugrud, Robert Lamb, and David Shilton.

7 John Cruden, Lois Schiffer, James Simon, and Steve Swanson.

8 William Myers and Michael Rosetti.

9 John Most.

10 Tom Clark.

referencing the Court Monitor's Supplemental Report.[11]

- One is mentioned in footnote 27 on pages 9-10 and in footnote 34 on pages 14-15, both with respect to the verification process for DOI's Quarterly Reports.[12]

- One is mentioned in two separate footnotes (footnote 23 on pages 7-8 and footnote 78 on page 50) for having authored documents critical of certain aspects of trust reform efforts.[13]

- One is mentioned in footnote 32 on pages 13-14 for having submitted a response to Plaintiffs' August 27, 2001 Contempt Motion, and in footnote 34 on pages 14-15 with respect to the verification process for DOI's Quarterly Reports.[14]

- One is mentioned in footnote 23 on pages 7-8 for having received an award, and in footnote 32 on pages 13-14 in connection with filing an opposition to Plaintiffs' August 27, 2001 Contempt Motion.[15]

Thus, a substantial majority of the thirty-nine alleged contemnors are barely mentioned in Plaintiffs' most recent motion, and none of the alleged contemnors are discussed in circumstances that could credibly be characterized as contemptuous.

Plaintiffs' August 27, 2001 motion is equally vague concerning which named contemnors are alleged to have engaged in what conduct. That motion specifically identifies twelve individuals who are alleged to be in contempt of this Court. Id., at 24-25. But eleven of the twelve individuals are not even mentioned in the portion of the August

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11 David Shuey.

12 Sabrina McCarthy.

13 Dominic Nessi.

14 Tim Elliott.

15 Edith Blackwell.

27, 2001 brief (pages 17-24) addressing Plaintiffs' request for an order to show cause. The only individual named as a contemnor in this portion of the brief, appellate attorney David Shilton, is implicated merely because he truthfully informed the Court of Appeals at oral argument that "the [Federal Register] administrative process has only recently begun." See Aug. 27, 2001 Contempt Motion, at 19. Elsewhere in that brief, i.e., not in the portion specifically addressing contempt, Plaintiffs also take issue with a DOJ attorney's opposition to Plaintiffs' request to take certain discovery. Id., at 5 n. 4. And Secretary Norton is mentioned because of her July 10, 2001 decision to create a new Office of Historical Accounting, which Plaintiffs characterize as "one more plan to make a plan." Id., at 7. None of these actions, however, is sufficient to state a prima facie case of contempt.

Plaintiffs appear to claim that the scope of the contemptuous conduct is so broad that they need not provide specificity in their allegations in order to be entitled to a show cause order. They point to the lengthy factual appendices submitted along with their August 27, 2001 and October 19, 2001 Contempt Motions - which in turn quote liberally from the series of Court Monitor Reports - as voluminous evidence of misconduct and bad faith on the part of these individuals. DOI and the alleged contemnors take issue with a large number of these factual allegations and, especially, with a great many of the conclusions drawn by Plaintiffs and the Court Monitor. But the legal authority set forth above establishes that contempt is a drastic remedy in place to address a specific form of misconduct, i.e., the knowing violation of a clear and unambiguous court order. In the absence of particularized allegations specific to how any individual alleged contemnor violated this standard, an order to show cause should not issue.

III. The Undisputed Record Establishes that DOI's Consideration of the Proper Method for a Historical Accounting Is Not a Basis for Contempt.

A. There is No Basis to Issue an Order to Show Cause Based on the Use of Statistical Sampling for the Historical Accounting.

In their contempt motions, Plaintiffs argue that misconduct occurred that warrants the issuance of an order to show cause with respect to the choice of statistical sampling for the preparation of the historical accounting. Plaintiffs' attempt to show that Interior Defendants violated an order of this Court is fundamentally flawed because this Court entered no order requiring an immediate transaction-by-transaction accounting or, indeed, any specific methodology; instead, it entered a declaratory judgment setting forth one aspect of the defendants' accounting duty with the specific recognition that other aspects of the accounting duty were subject to later determination.

On December 21, 1999, this Court rendered its decision on the Phase I issues. See Cobell v. Babbitt, 91 F. Supp. 2d 1 (D.D.C. 1999). With respect to DOI, this Court found that Plaintiffs had "proved four statutory breaches of IIM trust duties by the Secretary of the Interior that warrant prospective relief." Id. at 40. With respect to Plaintiffs' claim for a retrospective accounting, the Court stated that, "the second phase of this case will involve a trial regarding defendants' rendition of an accounting. In general terms, that process will involve the government bringing forward its proof on IIM trust balances and then plaintiffs making exceptions to that proof." Id., at 31. The Court also declared that the 1994 Reform Act "requires defendants to provide plaintiffs an accurate accounting of all money in the IIM trust held in trust for the benefit of plaintiffs, without regard to when the funds were deposited." Id. at 58.

The Court, although declaring the duty to account, left open significant questions regarding the nature and scope of the accounting owed. This Court specifically kept open the prospect of statistical sampling:

> It should be noted that the court is not ruling upon what specific form of accounting, if any, the Trust Fund Management Reform Act requires. For example, the court does not purport to rule on whether an accounting accomplished through statistical sampling would satisfy defendants' statutory duties. Moreover, the court will not now address other arguments that the government may make in the future on the "historical" nature of the accounting (e.g., statute-of-limitations arguments).

Cobell v. Babbitt, 91 F. Supp. 2d at 41, n.32.[16]

The Court of Appeals' review of this Court's decision verifies that the Court did not order any specific form of accounting. The Court of Appeals emphasized that "the choice of how the accounting would be conducted, and whether certain accounting methods, such as statistical sampling or something else, would be appropriate . . . are properly left in the hands of administrative agencies." Cobell v. Norton, 240 F. 3d at 1104. Similarly, the Court of Appeals explained:

> The district court also identified "significant legal issues" to be resolved in the second phase, such as . . . the use of statistical sampling. . . . Presumably, the district court plans to wait until a proper accounting can be performed, at which point it will assess appellants' compliance with their fiduciary obligations.

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[16] Similarly, the Court noted that: "significant legal issues that remain matters for the second phase of this case include: (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." Id. at n.22.

240 F. 3d at 1110.

Thus, the Court of Appeals plainly contemplated that the historical accounting would be worked out by the agency, but neither the Court of Appeals nor this Court foreclosed any methodology. And the Court of Appeals recognized that the matter would be reviewed when completed. This emphasis on the administrative agency process is important because it establishes the lack of legal merit to Plaintiffs' contempt motions on the choice of statistical sampling as the mechanism for the historical accounting.

B. There Is No Basis to Issue an Order to Show Cause Based on the Federal Register Process.

Plaintiffs claim that the decision to employ the Federal Register process to consult with those affected by the historical accounting as well as others was a sham and warrants the issuance of an order to show cause.[17] Those contentions reflect a misunderstanding of the notice and comment process in general and the decision in this case in particular. In the first place, the process is known and commonly used by agencies, and DOI has also employed it in consulting with Native Americans on other matters. In the second place, this Court and the Court of Appeals were notified at the outset that the Federal Register notice and comment process would be relied on here.

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

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[17] Although the Federal Register process and the notice addressed more than historical accounting, that is the short-hand that has been previously used, and we will use it here.

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, 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.").

Notably, the notice and comment process is employed by the Department of the Interior when consulting Native Americans and their tribal governments on a variety of topics. For example, after the Supreme Court decided Seminole Tribe of Florida v. State of Florida, 517 U.S. 44 (1996), Interior employed the Federal Register process of an advance notice of proposed rulemaking to acquire information about what direction to take under the Indian Gaming Regulatory Act in light of the Supreme Court's decision. See 61 Fed. Reg. 21394. And the President by Executive Order has directed consultation with Indian Tribal Governments. See, 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). Therefore, the choice of a Federal Register notice and comment process was consistent with the DOI's consultative practice, which was well established at the time of this Court's December 1999 opinion.[18] Equally important, this

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[18] This Court, *sua sponte*, certified its December 21, 1999 order for interlocutory appeal pursuant to 28 U.S.C. 1292(b). 91 F. Supp. 2d at 57. As this Court

Court and the Court of Appeals were notified at the outset that the notice and comment process would be used.

DOI's commitment to pursue the historical accounting using a Federal Register notice and comment process as the initial step was explained by the Assistant Attorney General ("AAG") for the Environment & Natural Resources Division in the United States' Corrected Petition for Permission to Appeal:

> [W]e have been informed by Interior that it will implement a process under the APA to meet its remaining obligations regarding reconciliation and accounting, including interpretation of the Act to specify in greater detail the nature and scope of these obligations and determination of reasonable and appropriate methods to meet them. That process will include consultation with Indian Tribes, an opportunity for comment by account beneficiaries and the public, and will commence with a notice published in the Federal Register on or before March 1, 2000.

Corrected Petition for Appeal, at 13 (January 5, 2000).

Consistent with the statements made in the petition, DOI prepared a proposed Federal Register notice. Recognizing that members of the Plaintiff class would read the Federal Register notice and attend the public hearings, Interior Defendants on March 1, 2000, moved this Court for an order declaring that the proposed Federal Register process did not violate ethical rules concerning attorney contacts with represented parties. Significantly, as part of this motion, Interior Defendants attached the proposed Federal Register notice.

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knows, that certification triggered a 10-day period during which defendants had to decide whether to appeal, get the authorization of the Solicitor General to pursue the appeal, and file a motion for permission to appeal.

By order dated March 28, 2000, this Court found that the communications contained in and contemplated by the Federal Register notice did not contravene applicable ethical rules. The notice was then published on April 3, 2000. See 65 Fed. Reg. 17525. The April 3, 2000 Federal Register notice advised interested parties of several options for completing a historical accounting. See 65 Fed. Reg. 17,521, 17,525-27 (Apr. 3, 2000). Although asking for comments on accounting options, the notice made it clear that it was unlikely that a complete transaction-by-transaction approach would be adopted. See id. at 17,526 ("it is unlikely to expect that the Congress would provide the Department with the staggering appropriations needed to fund such a process.") The notice further provided interested persons an opportunity to comment on the proposals through submission of written data, views, or arguments with or without opportunity for oral presentation. See id. at 17,523. And it scheduled meetings throughout the country. See id. at 17,521-23.

After the conclusion of the notice and comment process Special Trustee Slonaker and Assistant Secretary Gover wrote separate memoranda dated December 21, 2000. The Special Trustee's memorandum stated that "[t]he basic methodology used [for the project] will be a sampling technique, given the massive amount of records, the complexity, and the condition of the records." Special Trustee Memorandum at 1. Special Trustee Slonaker's memorandum to Secretary Babbitt attached a memorandum from Assistant Secretary Gover that the Special Trustee reported "also suggests that sampling is the most practical approach. . ." Id. The period the project was to cover was from 1952 through 1993. Id. Assistant Secretary Gover's memo analyzed the comments–overwhelmingly in favor of the latter method–and concluded that "given the massive number of records, the

complexity, and the condition of the records," the choice should be statistical sampling. Gover mem. at 5.

In his December 29, 2000, memorandum, Secretary Babbitt adopted this approach. In his memorandum the Secretary assigned the task of pursuing the statistical sampling to the Special Trustee. Id. For her part, by memorandum dated February 27, 2001, Secretary Norton, within a month of her confirmation and following the Court of Appeals decision, extended the period covered to begin on June 24, 1938 (rather than 1952), and run through 1993.[19]

Plaintiffs point to claims that some individuals at Interior apparently had misgivings regarding the wisdom of the Federal Register process. As part of this process, statistical sampling options remained a part of a larger, continuing process about how properly to conduct an historical accounting. The fact that some individuals at Interior may have disagreed with these conclusions and recommendations during the deliberative process does not make those conclusions improper. The deliberative process cannot be faulted simply because not everyone agreed with the choice made. It is true that Secretary Babbitt

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[19] Secretary Norton later created the Office of Historical Trust Accounting, which has produced its blueprint that encompasses more than statistical sampling. Secretarial Order No. 3231. In its Report Identifying Preliminary Work for the Historical Accounting (Nov. 7, 2001), OHTA noted that a number of projects that do not involve statistical sampling were in progress before OHTA was created and will be continued (background information/analyses, Report at 7-9; large dollar transaction project, Report at 13-14; judgment and per capita accounts project, Report at 14-15; special deposit account project, Report at 20-21). And the Secretary has announced a reorganization that further focuses Department of Interior resources on its trust responsibilities. See Notice of Proposed Department of the Interior Reorganization to Improve Indian Trust Management (filed Nov. 14, 2001).

could, perhaps, in March or April 2000, have embarked upon statistical sampling as the principal mechanism for the historical accounting without notice to and comments from those affected. But it certainly is not contempt not to have done so.

In addition, Plaintiffs also suggest that Interior Defendants perpetrated an "unprecedented fraud" on the Court of Appeals by relying on the Federal Register process. Id. at 20-21. But it is simply false to assert that the Federal Register process was "central" to the government's argument on appeal, or that Defendants engaged in "fraud," when all the government did was alert the Court of Appeals to the existence of the process.

The Opening Brief of Appellants in the context of a 5-page discussion of the Administrative Procedure Act contains a single sentence, noting the fact that "[t]he historical effort has recently been initiated by a Federal Register announcement." Brief at 60. The only other mention of the process in the brief is one sentence in the statement of facts. Brief at 17. These are the only mentions of the Federal Register process in the government's brief, and are simply true statements regarding the status of the Federal Register process. Contrary to Plaintiffs' allegation, no argument was premised on the process; in fact, the Government's reply brief did not even mention it.

Indeed, during the appeal, Plaintiffs themselves recognized that the legal effect of the Federal Register process was simply not an issue before the Court of Appeals. Although Appellees' Brief discussed the Federal Register process at 33-34, and made the same basic charges that the Federal Register process was not a legitimate effort to obtain public input but was "initiated by Interior with the express intent of supporting the appeal" (Brief at 34, citing to deposition of Thompson). Appellees explained that:

> Our position in the district court is that this 'process' was initiated for the purpose of further delay and as a means of communicating directly with the plaintiff class members so as to affect this litigation. Such questions need not be considered here....

Br. at 34 (emphasis added).

Consequently, to the extent the Federal Register process was mentioned in the Court of Appeals, it was accurately and appropriately portrayed, and Plaintiffs have provided no evidence that would support their charge of "deception." More importantly, Plaintiffs cannot possibly establish the required elements that the alleged "fraud" was material (when the Court of Appeals neither relied upon nor even mentioned the Federal Register process in its opinion) or that it was conducted with intent to defraud. Plaintiffs have fallen far short of making the necessary *prima facie* case that would warrant any contempt proceedings based on the appeal. Hence, even if this Court had jurisdiction over these matters,[20] it should deny the motion for an order to show cause, on the Federal Register

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[20] The power to sanction for conduct during an appeal is reserved to the appellate court, unless the appellate court specifically authorizes the trial court to fix the amount of a sanction. Conner v. Travis County 209 F.3d 794, 800-801 (5th Cir. 2000); see also Villa West Assoc. v. Kay, 146 F.3d 798, 808 (10th Cir. 1998)("'[T]he determination of the right to sanctions ... for conduct during an appeal is reserved to the appellate court, although it may allow the trial court to fix the amount of the fees and costs'"), quoting Morris by Rector v. Peterson, 871 F.2d 948, 951 (10th Cir. 1989); Schoenberg v. Shapolsky Publishers, Inc. 971 F.2d 926, 935 (2nd Cir. 1992)("it is improper for a district court to impose sanctions for appeals taken to this Court"); Cf. Cheng v. GAF Corp., 713 F.2d 886, 891-892 (2d Cir. 1983)("We are surprised by the district judge's willingness to sanction appellant's attorney, not for a motion made in the district court, but for appeals taken to this court and the Supreme Court."). Although our Circuit has not considered the issue, it has emphasized that the Court of Appeals has ample authority to assess "'sanction[s] for procedural abuse,'" in connection with an appeal, where they are warranted. South Star Communications, Inc. v. FCC, 949 F.2d 450, 452 (D.C. Cir. 1991), quoting Chambers v. NASCO, Inc., 501 U.S. at 59 (Scalia, J., dissenting); see Fed. R. App. P. 38. Accordingly, to the extent Plaintiffs seek sanctions in this Court for

process in general and certainly insofar as it relates to matters occurring in the Court of Appeals.

IV. The Record Establishes that DOI Officials Have Undertaken to Inform the Court Fairly and Honestly of the Status of Trust Reform Efforts, and Their Efforts To Do So Do Not Support a Finding of Contempt.

Plaintiffs have also argued that a finding of contempt is warranted based upon supposed misstatements and material omissions by some number of the alleged contemnors, relating to the status of the TAAMS program and data cleanup efforts. See Oct. 19, 2001 Contempt Motion, at 59-60. In support of this view, they have pointed to the Court's December 21, 1999 order, which provides, in relevant part:

> 1. Beginning March 1, 2000, defendants shall file with the court and serve upon plaintiffs quarterly status reports setting forth and explaining the steps that defendants have taken to rectify the breaches of trust declared today and to bring themselves into compliance with their statutory trust duties embodied in the Indian Trust Fund Management Reform Act of 1994 and other applicable statutes and regulations governing the IIM trust.
>
> 2. Each quarterly report shall be limited, to the extent practical, to actions taken since the issuance of the preceding quarterly report. Defendants' first quarterly report, due March 1, 2000, shall encompass actions taken since June 10, 1999.

Cobell v. Babbitt, 91 F.Supp.2d 1, 59 (D.D.C. 1999).

As an initial matter, Interior Defendants of course acknowledge that an order requiring them to submit periodic reports requires that the reports be truthful. At the same time, the law is also clear that contempt should not be imposed "if there are any grounds

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conduct occurring in the Court of Appeals, that relief should be denied as beyond this Court's jurisdiction.

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). Therefore, where the moving party calls for contempt based upon allegedly untruthful or misleading statements in a court-ordered submission, that party necessarily must establish that the statements or omissions at issue were plainly and unambiguously false at the time they were made.

In this case, the statements relied upon by Plaintiffs fall well short of this level. While Plaintiffs may fairly criticize DOI employees for their failure to recognize sooner the major problems that arose with these efforts - particularly with respect to TAAMS - that is a matter very different from contempt. In fact, the submissions made by DOI in response to the Court's December 21, 1999 order have included frank descriptions of the status of these efforts as they were viewed at the time. As a result, no finding of contempt can be based upon them.

A. TAAMS

The allegations relating to reporting on the status of TAAMS, which are referenced in Plaintiffs' motion and set forth in detail in the Second Report of the Court Monitor, can be grouped in three separate categories. First, Plaintiffs charge that DOI offered false testimony at Trial One. See Oct. 19, 2001 Contempt Motion, at 5; Oct. 19, 2001 Contempt Motion, Factual Appendix I, at 2. Second, Plaintiffs suggest that DOI improperly failed to bring to the Court's attention problems with TAAMS as DOI became aware of those problems between Trial One in June 1999 and the submission of a revised HLIP and First Quarterly Report in March 2000. And finally, Plaintiffs allege that the Quarterly Reports

and other documents submitted to the Court from March 2000 forward have not accurately described the problems with the system. These will be addressed in turn.

1. Accuracy of Trial Testimony

Plaintiffs suggest that DOI officials, principally Dominic Nessi, "willfully misrepresented" the status of the system at Trial One. See Oct. 19, 2001 Contempt Motion, Factual Appendix I, at 2. Their primary allegation on this point is that there were sufficient "data conversion and user requirement problems with TAAMS" even prior to the trial that Mr. Nessi should have known that the goals and schedules set forth at trial could not be met. Id., at ¶ 4; see also id., at ¶ 13 ("... there were significant problems with the ability of BIA to provide the requisite user information. There were management issues that had not been resolved that [Nessi] knew could delay or disrupt implementation").[21]

As an initial matter, it is important to emphasize that Plaintiffs' argument on this point is not that Mr. Nessi falsely testified as to then-existing facts at trial, but instead that he should have known that predictions as to future events were not realistic. Thus, while it is unquestionably true that some of the schedules articulated by Mr. Nessi were not actually met, that fact in and of itself does not make his testimony untrue at the time it was offered. In order to establish that the testimony "willfully misrepresented TAAMS," as Plaintiffs now suggest, they must offer strong evidence that Mr. Nessi could not actually

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[21] Plaintiffs' factual appendix contains ten separate paragraphs under the heading "Dominic Nessi and Defendants' Witnesses Willfully Misrepresented TAAMS During Trial One." See Oct. 19, 2001 Contempt Motion, Factual Appendix, at 2-4. Only three of those ten paragraphs, however, directly address the content of Trial One testimony. Id., at ¶¶ 4 -5 & 13.

have believed the schedule to be possible at the time he testified.

This Plaintiffs plainly cannot do. Although data conversion had not been completed at the time of the trial, Mr. Nessi had been assured at the time by the responsible contractor, ATS, that the errors could be fixed promptly. See Second Report of the Court Monitor, at 33 ("They could not get the data converted into TAAMS from IRMS as quickly or efficiently as they would have liked. But ATS assured him that the system would be ready for the July 1999 user acceptance test"). In addition, Mr. Nessi also testified that the set milestones were aggressive, and that there was no guarantee that it would be possible to meet them. See, e.g., Exhibit 3, Transcript of Trial One Testimony, at 2280 (deployment schedule is "tentative until we know that we have a good system that's well tested and ready to move forward"); 2281 (milestones were "aggressive").[22] Where Mr. Nessi had been assured that data conversion problems could be solved quickly, and made clear that the deployment schedule was tentative, one simply cannot say that he knowingly presented false testimony at Trial One. Plaintiffs very brief treatment of his testimony in their Factual Appendix I does nothing to undermine this view.

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[22] Excerpts from Trial One testimony cited herein are compiled at Exhibit 3, They are referenced in the brief below by the witness's name and the pages of the transcript, e.g., "Nessi 2280."

2. Alleged Failure to Correct Trial Testimony Prior to December 1999

Plaintiffs devote more attention to an argument that DOI should have supplemented the testimony it provided at Trial One, once it became apparent in the months after the trial that the goals set forth in the HLIP and testified to at the trial would not be met during the time period originally envisioned. See, e.g., Oct. 19, 2001 Contempt Motion, at 59 ("they knowingly omitted forthright discussions of the chronic TAAMS failure"). In support of their allegations on this point, Plaintiffs in particular point to the fact that DOI officials actually prepared a draft report to be submitted to the Court in September 1999 on this issue, but, for reasons that have not been explained, did not submit it. See Oct. 19, 2001 Contempt Motion, Factual Appendix I, at ¶¶ 14-21. Plaintiffs' argument on this point is not that the trial testimony was inaccurate at the time it was given, but instead that DOI had an obligation to bring delays and changes to the attention of the Court.

As an initial matter, of course, the December 1999 order requiring DOI to submit quarterly reports was issued approximately six months after Trial One, and it therefore cannot serve as a basis for a contempt finding for alleged failure to disclose information to the Court prior to its issuance. Similarly, once this Court issued its December 21, 1999 ruling, DOI was specifically obligated to submit on March 1, 2000 both a revised HLIP and a report on "actions taken since June 10, 1999." See Cobell, 91 F.Supp.2d at 59. In light of the specificity of the Court's order, it cannot be deemed contemptuous to compile the recent changes in the comprehensive statement on the status of the project submitted in March 2000. In short, there is simply no "order," much less a "clear and unambiguous" order, that Plaintiffs can point to as having been violated by the alleged failure to disclose

information prior to the March 1, 2000 submissions.

Nevertheless, Plaintiffs have questioned whether DOI officials should have reported developments in the TAAMS plan and schedule in the fall of 1999, prior to the issuance of the Court's December 21, 1999 summary judgment ruling. It is well established that an attorney in litigation has a duty of candor to the Court. See, e.g., Tiverton Board of License Commissioners v. Pastore, 469 U.S. 238, 240 (1985); Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 246 (1944). Although separate and distinct from the law of contempt, this duty of candor requires counsel "to inform the Court of any development which may conceivably affect the outcome of the litigation." Tiverton Board, 469 U.S. at 240, quoting Fusari v. Steinberg, 419 U.S. 379, 391 (1975) (Burger, C.J. concurring). Because Plaintiffs' allegations do implicate the duty of candor to the Court, they merit a response.

a. DOI Emphasized at Trial One that There Would Undoubtedly Be Significant Change to Both the Schedule and Course of the Reform Effort.

Although there were delays from and alterations to the plan that had been presented at Trial One, any evaluation of DOI's actions after Trial One and prior to the Court's December 21, 1999 ruling must take into account the fact that its witnesses and attorneys at Trial One emphasized repeatedly and forcefully that there would undoubtedly be changes to the system and the timetable for its rollout. DOI has always recognized both the seriousness of the challenges facing it in trust reform and the probability that such significant reforms will require changes to planned activities as new lessons are learned and problems encountered. It was these very factors that caused DOI to emphasize to the

Court during Trial One that the HLIP was a living document that was subject to change. For instance, DOI specifically explained this fact to the Court prior to the trial:

> It is important to note that the HLIP is a planning document that will be amended and evolve as needed. The document itself states that each of the "Sub projects may be modified during the process of their implementation to reflect change and/or unanticipated circumstances, including, for example, the availability of funding and personnel."

Defendants' Trial Memorandum (June 9, 1999), at 16. Similarly, former Secretary Babbitt testified during Trial One that HLIP "is, by consent of all, a truly dynamic document ... it should be under revision all the time." Babbitt, 3969. Defendants made the same point in post-trial submissions:

> As evidence of the fluid nature of the HLIP, since its promulgation in July 1998, it has been undergoing revisions intended to strengthen and describe in more detail its key activities. At the time of trial, Interior was about to issue an amendment to the HLIP, "sort of a mid course correction." As a result of this amendment process, some sub-projects will apparently be combined, some milestones changed, and some key activities (and associated milestones) added. These revisions and amendments improve the HLIP as an implementation and performance measurement tool.

Defendants' Proposed Findings of Fact and Conclusions of Law at 45 n.28 (Aug. 4, 1999), citing Gover, 1081; Thompson, 2983-84, 2992, 2994, 2997-98, 3003, 3006-07, 3022. And the Acting Special Trustee at the time of trial testified that it is common and appropriate, in a complex management environment, to continually revise and change plans. Thompson, 2981-82. As Mr. Thompson testified, "[y]ou can pretty much say that once a plan is published, it's outdated, and so you need to start working on the next one." Id.

The HLIP subprojects were developed without traditional project development

methods, and often without a complete understanding of the existing conditions and business practices used by the various BIA agencies and offices. For instance, with regard to the TAAMS subproject, Assistant Secretary Gover acknowledged that he knew there were risks with moving quickly but that it was important to him that TAAMS get underway during his administration:

> We could have done more research and more work before developing TAAMS that would have reduced the risk. There's no question about it. But if we had done that, then two years from now we would still not have a TAAMS system. We made a calculated judgment that it was worth the risk. We knew that there was a risk, but it was worth it to – to expedite the deployment of TAAMS.

Gover, 1117.

Defendants' witnesses also recognized that the plans for such projects as TAAMS and BIA Data Cleanup were subject to change and were particularly aggressive. Defendants presented extensive testimony at Trial One about the TAAMS pilot project that had just begun in Billings, Montana, and was designed to test whether the functionality of the basic TAAMS system was able to meet all the varied needs of the Department. See, e.g., Babbitt, 3709-10. As the testimony reflected, inherent in such systems testing is the possibility that the results will demonstrate the need for further changes in the proposed system. Assistant Secretary Gover testified:

> THE WITNESS: Even after it is deployed - - in Billings, for example we're going to learn more about the system - -
>
> THE COURT: Right.
>
> THE WITNESS: - - and know what more things we would like for it to be able to do, and the software will again be modified.

Gover, 1119. Mr. Gover also acknowledged that this process would require repeated testing of the system until it was shown that it had all the functionality required to meet the BIA's needs, and expressed his commitment to making sure that goal was attained. "In any software development, there are going to be some bugs" but that "we will continue to debug and otherwise modify the software until it can do what we want it to do." Gover, 1156-58; accord Thompson, 3027-29. Similarly, Mr. Orr, the Vice President of the contractor providing TAAMS, testified that there were issues, such as user dissatisfaction with the basic TAAMS system, which if they arose could delay TAAMS deployment. Orr, 2919; see also Defendants' Proposed Findings of Fact, at ¶ 229.

Acting Special Trustee Thompson also testified that he believed the TAAMS rollout schedule was going to be tough to realize, largely because of the complexity of the TAAMS system and the compressed planning and implementation schedule:

> Well, the way the thing was rolling out on these system development pieces, the [TAAMS] schedule was highly compressed. There was very little time in my mind to finish the work between the time we published the high level plan and when the final action was due, which was 12 months away. I pointed out that we had taken a couple of years, in the case of OST, to get to that same point, and that assuming and thinking that the work in BIA was going to be more complex, that that time frame was going to be tough.

Thompson, 2964-65.

In sum, at Trial One Defendants presented their plans for the reform of the individual Indian money trust – a complex and challenging task that was underway but far from complete. Defendants acknowledged expressly that their plans were aggressive and specifically argued that they were not final and were subject to change as trust reform

proceeded. Any review of the propriety of DOI's actions prior to the Court's December 1999 ruling must be judged in this context.

b. No Contempt Is Warranted for Events in the Summer and Fall of 1999.

At the core of Plaintiffs' position on this issue is the fact that, due largely to recurring difficulties converting trust data from legacy systems to TAAMS, it took DOI longer than expected actually to run the Billings pilot project on live data, thereby impacting the roll-out of the system to other parts of the country. The schedule contemplated by DOI at the time of Trial One was for a 100-day pilot project to be carried out in Billings, Montana in the summer of 1999, during which both TAAMS and the legacy computer systems would run in parallel. See Nessi, 2280. If the results of the pilot were acceptable, TAAMS could then be run in other parts of the country. Id. This pilot would run on "live data," so it was important not only that the computer hardware and software be ready for use, but that supporting data be sufficiently converted from the legacy system to make the system capable of performing adequately. See Nessi, 2352.

Shortly after trial, DOI officials learned that there were sufficient problems, principally with data conversion, that the system was not ready for actual operation on live data. See Second Report of the Court Monitor, at 40-41. Though ATS officials continued to express confidence that the problems could be solved within a reasonable period, id., at 40, delays continued through July and August. Further contributing to these delays was a series of "significant modifications in the software to accommodate the different trust

operations carried out in each separate region." Id.[23]

The status of TAAMS was the subject of a September 8, 1999 meeting among top DOI officials, including DOI Chief of Staff Anne Shields, Assistant Secretary Kevin Gover, Assistant Secretary John Berry, Deputy Assistant Secretary Robert Lamb, Acting Special Trustee Tommy Thompson, and Chief Information Officer Daryl White. See Exhibit 4. Among the items noted on a summary of that meeting are that data conversion "has been repeatedly delayed due to numerous problems" and that "[i]n effect, the TAAMS pilot is just beginning." Id. It concludes that DOI "needs to quickly inform ... U.S. District Judge

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[23] As Mr. Nessi testified at trial, TAAMS was initially envisioned as an "off the shelf" system that would, with some modifications necessary to address specific BIA needs, also assist to standardize the quite disparate business practices of different offices around the country. See Nessi, 2300-01. In essence, DOI hoped and expected that TAAMS, beyond simply providing better record-keeping, could itself drive separate BIA offices to do business in a more uniform and generally accepted fashion in order to make their practices "fit" TAAMS. But this approach was jeopardized in the summer of 1999, due to much publicized complaints about the "user-friendliness" of a new and entirely separate computer system developed by DOI's Bureau of Land Management. See Second Report of the Court Monitor, at 42. In response to complaints from users of that BLM system - and ultimately from Congress - DOI came to the conclusion that it could not repeat this problem with respect to TAAMS. As the Court Monitor explained:

> The DOI did not want TAAMS to also be rejected by BIA users who were complaining that it was a COTS system incapable of meeting their needs and was not user-friendly. DOI changed the nature of the contract with ATS to reflect the goal of meeting BIA user needs. Congress also passed appropriation language to ensure BIA users were satisfied with the system before its implementation. This change in philosophy and direction invited the BIA users to demand significant modifications in the software to accommodate the different trust operations carried out in each separate region.

Id.

Royce C. Lamberth." Id.

Another contemporaneous record of this meeting is a September 9, 1999 e-mail message from Ms. Shields to Edward Cohen of the DOI Solicitor's office. See Exhibit 5. It summarized briefly the conclusions of the previous day's meeting and explained that, while there appeared to be no legal requirement to provide updated information to the Court, it would be wise to provide this information to the Court prior to Secretary Babbitt testifying in Congress on the same subject. The e-mail reflected a still upbeat prognosis about TAAMS, tempered somewhat by the recent slippage in deadlines:

> [W]hile the consensus [of the meeting] was that no one had testified [at Trial One] to an exact schedule so we probably don't have to correct anything, everyone thinks that the court has the schedule in some of the documents and since we will be giving the Hill clarification, we should give it to the court as well. Dom [Nessi] said he had send [sic] a one-pager to SOL (I have a copy) which should suffice. Dom seems to think we are reaching our goals in a timely fashion, that everyone should expect changes along the way. The biggest issue seems to be the need for intensive training for users so that they know how to use the system and are confident that they know how so they will use it. That is under way.

Id. K2, Tab 4H. Included with the Second Report of the Court Monitor is a document that appears to be the "one-pager" from Mr. Nessi referenced in Ms. Shields' e-mail. See Exhibit 6. That document summarizes briefly the revisions to the TAAMS schedule that had occurred since the beginning of July 1999.[24] In the following weeks leading up to

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[24] That document refers to three TAAMS developments since July 1, 1999. First, actual operations in Billings, originally scheduled to begin shortly after the June 25, 1999 ceremony there, were postponed until September 1999. It explained that "[t]he impact on the over-all schedule is negligible as all agencies will be operational on the same dates as the earlier schedule. Second, the beginning of the Billings system test was delayed by two weeks, from September 13, 1999 to September 27, 1999. Third, the

Secretary Babbitt's testimony, several drafts of a short submission were circulated within DOI. See Exhibits 5B-5F to the Second Report of the Court Monitor. Ultimately, for reasons that are articulated in neither the contemporaneous e-mail correspondence nor interviews conducted by the Court Monitor, no report was filed with the Court at that time.

Especially given that DOI officials themselves determined that these delays and changes should be brought to the Court's attention in the fall of 1999, it would have been the right course for them to have done so at that time. That they did not, however, does not imply that contempt is appropriate. As explained in detail above, DOI witnesses and attorneys repeated frequently before, during and after Trial One that the proposed schedule was aggressive and that there would likely be delays and problems as development proceeded. The very nature of this extraordinarily complicated computer system necessarily makes it difficult for anyone to know with a high degree of confidence how and when problems may or may not be solved in the future. In addition, DOI officials ultimately did report this information - in a frank and straightforward fashion, as discussed below - in their March 2000 Quarterly Report and revised HLIP; in light of the remedial nature of civil contempt and the fact that a party is entitled to bring itself into compliance before any sanction is imposed, this fact alone precludes a show cause order. And of course, there was no judicial order in place at the time that might now trigger invocation of the Court's contempt powers. Indeed, Plaintiffs have cited no case (and

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original plan was modified first to put in operation the Title module, and delay operation of the Realty module. These changes are later documented in the revised HLIP, submitted to the Court in March 2000.

Interior Defendants are aware of none) in which an alleged violation of the duty of candor was recognized as even a possible basis for a contempt finding. In light of all of these factors, Plaintiffs' allegations on this point simply cannot support the issuance of a show cause order.

3. Accuracy of Quarterly Reports and Revised HLIP

After the Court's December 1999 ruling, DOI provided regular reports to the Court regarding the status of TAAMS through its Quarterly Reports and, along with the First Quarterly Report submitted on March 1, 2000, a revised HLIP. Plaintiffs have suggested that these submissions to the Court have not accurately described the status of the TAAMS project. See Oct. 19, 2001 Contempt Motion, at 5.[25] With respect to TAAMS, they focus upon DOI's March 1, 2000 submissions, arguing that these documents did not disclose that tests "had failed to prove the system was even close to deployment and certainly not implementation." See Oct. 19, 2001 Contempt Motion, Factual Appendix I, at ¶ 22; see generally id., at ¶¶ 22-33.

Any after-the-fact scrutiny of the adequacy of DOI's submissions – particularly when reviewing those submissions for the possible imposition of contempt – must keep firmly in mind the position of the drafters of these documents at the time they were

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[25] To the extent that Plaintiffs' August 27, 2001 and October 19, 2001 motions seek contempt based upon issues presented in the Fourth and Supplemental Reports of the Court Monitor, Interior Defendants will not present a separate factual response in this brief, but will instead rely upon the response to those reports filed separately by the DOJ Civil Division today. Similarly, to the extent that Plaintiffs' current contempt motions rely upon issues raised in their three contempt motions filed prior to August 27, 2001 (i.e., those motions filed on August 15, 2000, April 9, 2001, and May 17, 2001), Interior Defendants rely upon their responses to those motions already on file.

prepared. While the documents contain frank assessments of the delays that had occurred and the continuing challenges still ahead, they cannot be expected to anticipate every possible future problem. Predictions about the future are undoubtedly informed by the past, but inform is all that the past can do. Indeed, the Court's order calling for the submission of these documents recognizes the point, as it requires DOI reports to include "the steps that defendants have taken to rectify the breaches of trust declared today and to bring themselves into compliance with their statutory trust duties," and provides that each report "shall be limited, to the extent practical, to actions taken since the issuance of the preceding quarterly report."

When judged with these considerations in mind, the record demonstrates that DOI's submissions are more than reasonable under the circumstances, and do not support a finding of contempt. While any review can - with the benefit of hindsight - reveal problems that DOI might have better foreseen or communications that might have been more clearly worded, this is quite different from suggesting that alleged defects in the submissions warrant contempt. In fact, the plain language of DOI's submissions communicated the major problems encountered with TAAMS development in a manner that was accurate and in keeping with the Court's order.

The delays and problems reported in these March 2000 submissions are many. An introductory "Observations" section of the TAAMS portion of the revised HLIP begins with the recognition that "[t]he original plan for modification and deployment of TAAMS has undergone considerable change since the unveiling of the initial prototype in June 1999." See Exhibit 7, at 69. It explains the nature of the two most important structural

changes:

- While the original vision for TAAMS was as an "off-the-shelf system with minor modifications," that approach had been fundamentally altered to "a user-centric design effort that allows for the development of numerous system releases, each one closer to the final target than the last. This is an accepted process for rapid system development and helps to ensure that the user community has a significant opportunity for input on the design." Id.

- During development, "it became apparent that the lack of consistent business rules and processes across BIA (many resulting from statutes and probate laws that vary from state to state) placed the software vendor in a very difficult position as it attempted to modify the software to meet BIA's needs. Although it was always assumed that additional adjustments would be necessary after the first prototype, it was initially believed that a large part of the basic functionality was present in the late-June 1999 release of TAAMS. This was not the case and it became apparent during the system tests conducted with BIA users during July 1999 and August 1999 that a significant level of analysis and system modification remained in order to ensure that all of the BIA's unique business functions were addressed." Id.

These are, by any measure, frank assessments of the nature of the changes that had occurred since Trial One.

The Observations section then goes on to explain the ramifications of these fundamental changes in "real world" terms. Because of the dramatic nature of the changes revealed in this portion of the report, it is quoted here at some length:

> The combined impact of these two factors was that many more releases would be necessary than originally anticipated when the initial prototype was released. Throughout this period, the TAAMS team would project that the "next" version would satisfactorily meet the core functionality of the users, only to find that the users determined that additional modification was necessary. It should be noted that BIA staff have limited experience in system design and it is not surprising that they would not be able to articulate their needs without a significant level of interaction with the software vendor – a level of interaction that often competed with other pressing

demands for their time.

As a result, in order to more clearly define the core requirements, the software vendor and TAAMS team began to focus primarily on the needs of the Billings Regional Office with a reduced level of input from other BIA regions. Chosen as the pilot, Billings represented a good target for TAAMS because their workload represented the overwhelming majority of types of realty transactions and their workforce followed the most common BIA realty practices.

An unanticipated result of the frequent version releases was that the data migration did not have a consistent target from July 1999 through approximately September 1999. As a result, test conversions would have to be adjusted every time the underlying data structure was adjusted. With versions being released in a rapid manner, there were times when system testing was difficult because the data did not properly match the data structure.

Furthermore, while the Billings data was sufficient for the legacy systems, it required significant modification for the TAAMS database structure. For example, fee owners in the legacy system did not need a unique identifier. However, in TAAMS, a unique identifier was necessary to ensure database normalization. This necessitated both an immediate business decision and a conversion process that would create a unique identifier. Each time a new version was released, all of these features would need to be reviewed to ensure that they did not conflict with some aspect of TAAMS not previously decided upon.

Another unanticipated result of the design effort was that it did not lend itself to system testing in the traditional sense. Testing was conducted continuously after each version was released. However, the data conversion issues discussed above oftentimes interfered with a full test. Unit, integration and system testing was conducted routinely by the software vendor throughout the modification process.

Similarly, training was conducted frequently during the summer and early fall 1999 for BIA regional personnel with the expectation that the last release would be the final release. Training often illustrated that the latest release did not meet the user's needs and also that business rules continued to need refinement. An important lesson learned during the training effort was that the legacy systems and TAAMS

> were so different in approach, technology and concept that longer, more intensive training classes than originally considered would be required. A new concept for training emerged that is now being implemented. A central facility will be used for all training - the Applied Terravision System, Inc (ATS) facility in Dallas - with the instructors provided by ATS. BIA co-trainers will be available to answer questions about the business aspects of TAAMS, whereas ATS instructors will teach the proper use of the software.

Id., at 69-70. The report then summarizes the cumulative effect of these changes:

> The net result of these events during the late summer and early fall was that the deployment schedule outlined in the TAAMS contract could not be achieved as originally planned. In retrospect, the Department concedes that the plan was overly optimistic given the complexity of the task at hand.

Id., at 70-71. While the language of this report is professional, its conclusions certainly are both negative and far-reaching. In light of its frankness and self-criticism, it is difficult to imagine how Plaintiffs can characterize DOI as having failed to reveal the mounting problems with the system or to conceal the problems that had beset it.

The First Quarterly Report also addresses several important changes in the TAAMS project. It explains that "interfaces between TAAMS, TFAS and MMS are not yet complete," and that there had been a change to deploy on a "functional" rather than a "geographic" basis. First Quarterly Report, at 13. It notes that the plan presented at Trial One called for deployment of the system to all regions by June 2000, but that that deadline was no longer in consideration and no other goal had been imposed to replace it. Id. "The actual deployment schedule, whether geographic, functional, or some combination thereof, is dependent upon progress in data cleanup at all locations and software development and testing." Id.

Plaintiffs' second-guessing of the contents of this report is not justified, and cannot support a finding of contempt. They assert, for instance, that "[t]he uninformed person reading this TAAMS section of the Quarterly Report would have no idea of the major software, data conversion, testing, and user acceptance problems that TAAMS had developed." Oct. 19, 2001 Contempt Motion, Factual Appendix I, at ¶ 23. While Plaintiffs are technically correct that the lion's share of the bad news was conveyed in the revised HLIP and not in the TAAMS section of the First Quarterly Report, the lengthy portions of the HLIP quoted above convey precisely this information. Similarly, Plaintiffs' complaints about the contributions of DOI counsel to these documents, see id., at ¶¶ 24-25,[26] are beside the point: because the HLIP and First Quarterly Report conveyed accurate and frank information about the status of the project, there is simply no reason to call into question the attorneys' contributions to this process.

Plaintiffs' suggestion that the March 1, 2000 submissions somehow lulled the Court into a false sense of security about the status of TAAMS are also belied by the strongly worded criticism offered by the Court at an April 4, 2000 hearing, shortly after those submissions were filed. Expressing frustration at the pace of these efforts - particularly when contrasted with the more optimistic testimony provided at Trial One - the Court

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[26] It is also worth noting that the disparaging reference to Mr. Elliott in the Factual Appendix to Plaintiffs' most recent motion, see Oct. 19, 2001 Contempt Motion, Factual Appendix I, at ¶ 24, is apparently in error. Specifically, Plaintiffs' assert that it was Mr. Elliott who, according to contemporaneous notes of a February 22, 2000 meeting, commented that there was "perhaps too much candor" in the draft HLIP. In fact, the notes themselves attribute that comment not to "TE," but instead to "T2." See Exhibit 8.

addressed at length the ways in which the revised HLIP and First Quarterly Report demonstrated significant changes from earlier expectations. See Exhibit 9, Transcript of April 4, 2000 Hearing, at 6-9. In sum, while there had been substantial changes in the TAAMS plan by March 2000 and the Court had ample justification to be concerned about those changes, the record clearly reflects that they were brought fully and fairly to the Court's attention.

B. Data Cleanup

Relying heavily upon the conclusions of the Third and Fourth Reports of the Court Monitor, Plaintiffs also assail the representations made by DOI regarding data cleanup in its Quarterly Reports. See generally Oct. 19, 2001 Contempt Motion, Factual Appendix II, at ¶¶ 14-19; Factual Appendix III, at ¶¶ 20-29. For instance, they take issue with the fact that the data cleanup sections of the Quarterly Reports relied heavily upon information received from the data cleanup contractor, Datacom, but did not include significant discussion of the progress of BIA personnel in carrying out data cleanup work assigned to them. See Factual Appendix II, at ¶ 19. They suggest that a statement in the Seventh Quarterly Report that "[t]he exact status of the BIA Data Cleanup and Management, including work performed by BIA personnel, will be in the next quarterly report," see Seventh Quarterly Report, at 13, is a tacit admission that the "exact status" of work by BIA personnel had never been provided previously. Id., at ¶ 15. Plaintiffs conclude that "BIA subproject managers and senior management have either failed to understand the true nature of data cleanup operations or, more likely, have sought to avoid reporting it to their superiors and this Court." Id., at ¶ 18.

A foundation for Plaintiffs' attack upon DOI reporting of data cleanup activities is, therefore, that BIA personnel are doing a sufficiently significant portion of the data cleanup work that not including some measure of their progress materially misleads the Court. A review of the record before the Court on this topic, however, reveals that there is no clear evidence on the precise role that BIA personnel are performing in this effort. While there have been statements that BIA personnel carry out some of this work, the DOI subproject manager has reiterated his own understanding that the work carried out by BIA personnel is not a significant percentage of the total work done. Because the existing record is unclear, because DOI has indicated that it will investigate the matter further and prepare a summary of its findings, and because there is no indication that the subproject manager did not have a good faith basis for his belief on the point, contempt proceedings are not warranted.

Since the institution of the quarterly reporting requirement, DOI has struggled with the question of how best to report the progress of data cleanup activities in some statistically meaningful way. In the Third Quarterly Report, for instance, DOI explained that the "Special Trustee will ... work with the BIA subproject manager to obtain meaningful metrics on the progress of the BIA data cleanup effort." See Third Quarterly Report, at 3. In the next report, DOI noted that it had decided upon a format for charting progress on that issue in each region, and that "[t]hat information will appear in a chart that will be refined for use in the next quarterly report, and will provide observers a more useful monitoring tool." See Fourth Quarterly Report, at 7. The two following reports in fact did include these charts, though DOI ultimately concluded that "progress

measurement [in this format] ... continues to be insufficient" and discontinued the charts. See Sixth Quarterly Report, at 4.

The Third Report of the Court Monitor, issued on September 17, 2001, raises a more specific concern about DOI's reporting on the status of data cleanup. The Court Monitor notes that the charts submitted with the Fifth and Sixth Quarterly Reports reflected only Datacom progress. See Third Report of the Court Monitor, at 21. "The BIA Data Cleanup reports have not addressed the activities of the local [BIA] data cleanup personnel and do not provide and accurate or complete picture of what the overall status of data cleanup is in any Region." Id.; see also id., at 31 ("These reports ... did not reveal any hint of the exact status of data cleanup or what the BIA personnel had or had not accomplished"). The precise factual basis for the Court Monitor's conclusion that BIA personnel carry out a substantial portion of this work is not stated, other than the fact that he attended an August 28, 2001 meeting of data cleanup managers where "the activities of BIA data cleanup personnel were painfully apparent." Id., at 31.

In response to these and other criticisms in the Court Monitor's report, the subproject manager for data cleanup, Terrence Virden, submitted additional information for inclusion in the Seventh Quarterly Report to be filed at the end of September 2001. In that submission, Mr. Virden explained:

> The BIA has been asked to assess and report on the status of data cleanup work accomplished by BIA staff. A regional data call has been initiated and results will be reported in the next quarterly report. Based on preliminary feedback, however, this will not be a significant percentage of the total.... The BIA subproject manager will submit a white paper on the efficiency of collecting information that falls into the category of data cleanup that is conducted as part of regular job

duties to the Special Trustee during the next quarter.

Exhibit 10, at 2 (emphasis in original). The submission then summarizes briefly the types of data cleanup work performed by BIA staff in the various regions. Id. Similarly, the Fourth Report of the Court Monitor notes that Mr. Virden explained in interviews that "[h]e did not believe that there was very much data cleanup work performed by BIA personnel. Also, what they were performing was an additional duty to their regular duties. He believed that most of the data cleanup was being accomplished by the DataCom contractor." Fourth Report of the Court Monitor, at 15.

What is striking about this discussion is the apparent disagreement between Mr. Virden and the Court Monitor over a factual issue that, one would expect, should lend itself to a factual resolution. The Court Monitor's report does not explain in detail the basis for his conclusion that BIA personnel perform a substantial amount of this work, relying instead upon his assertion that it was "painfully apparent" at the August 28, 2001 meeting he attended. Mr. Virden's view, based upon his contact with regional offices, was, by his own admission, preliminary, and he was relatively new to his position. In addition, he has now indicated that he will have staff investigate the matter more fully and submit a report. Indeed, it appears that the question of whether the submission of Datacom statistics might not accurately account for the status of data cleanup efforts by BIA personnel was first raised by the Court Monitor in his September 17, 2001 report. In light of the ambiguity of the record, the relatively short time that the issue has been presented squarely, and Mr. Virden's apparent good faith belief that what he reported was accurate, contempt proceedings are unwarranted.

CONCLUSION

For the foregoing reasons, Plaintiffs do not raise factual or legal allegations that would support an order of contempt, and no order to show cause should issue.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

ORDER

Upon consideration of Plaintiffs' August 27, 2001 Motion for Order to Show Cause Why Past and Present Interior Defendants and Their Employees and Counsel Should Not Be Held in Contempt, it is hereby ORDERED that Plaintiffs' motion is DENIED.

Upon consideration of Plaintiffs' October 19, 2001 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, it is hereby ORDERED that Plaintiffs' motion is DENIED.

UNITED STATES DISTRICT JUDGE

Date:

Exhibit 1

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al,	.	Docket Number: CA 96-1285
Plaintiffs,	.	
v.	.	Washington, D.C.
	.	October 30, 2001
SECRETARY OF INTERIOR, et al,	.	10:00 a.m.
Defendants.	.	

TRANSCRIPT OF STATUS CALL
BEFORE THE HONORABLE ROYCE C. LAMBERTH
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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court, and we will hand serve plaintiffs on the 15th, I think that that would certainly make things more efficient from our side and move this process forward more quickly.

THE COURT: That is only as to the August motion.

MR. NAGLE: There was a motion -- a motion for extension of time previously submitted in connection --

THE COURT: Which I never granted.

MR. NAGLE: I beg your pardon, Your Honor?

THE COURT: Which I never granted.

MR. NAGLE: Well, that is correct, Your Honor. We could not discern a ruling in the record.

THE COURT: Right.

MR. NAGLE: If that could likewise be made --

THE COURT: Well, if I had time to have this status, if I hadn't been pulled off by the FISA court, it would have been denied, but in light of my own time problems I will grant it until August 15th -- I mean until November 15th as well.

MR. NAGLE: Thank you very much, Your Honor.

THE COURT: All right, anyone else have anything else you want to say today?

(No response.)

THE COURT: I will schedule further proceedings after I see what the government files on November 15th. I hope the government in that filing will tell me who is in

charge of trust reform for the government, because it is sure not obvious to me that anybody is in charge. If it is allegedly the Secretary, she sure doesn't act like it.

(Whereupon, the proceedings in the above-styled matter were adjourned.)

- - - - -

CERTIFICATE OF COURT REPORTER

I hereby certify that the foregoing is a correct transcript in the proceedings in the above-styled matter.

SUSAN PAGE TYNER, CVR-CM

OFFICIAL COURT REPORTER

Exhibit 2

to ITMA 11th Annual Mtg
Oct. 25, 2001. Las Vegas, NV

INTER-TRIBAL MONITORING ASSOCIATION
PRESENTATION

THANK YOU, CHIEF TILLMAN, FOR INVITING ME TO SPEAK TODAY.

I HAVE HAD THE OPPORTUNITY TO SPEAK TO THE BOARD OF ITMA ON TWO PREVIOUS OCCASIONS ABOUT THE ROLE OF THE COURT MONITOR IN THE COBELL V. NORTON LITIGATION. THOSE PRESENTATIONS HAVE INCLUDED A DISCUSSION OF THE SUBSTANCE OF THE REPORTS I HAVE SUBMITTED TO THE COURT.

I WOULD LIKE TO ACCOMPLISH SIMILAR OBJECTIVES IN TALKING TO YOU IN THE TIME I HAVE TODAY.

FIRST: I WANT TO TELL YOU WHO I AM, THE ROLE I HAVE BEEN ASSIGNED BY THE FEDERAL COURT IN THE COBELL V. NORTON LITIGATION, AND WHAT I HAVE BEEN DOING DURING THE LAST SIX MONTHS.

SECOND: I WANT TO SUMMARIZE FOR YOU THE CONCLUSIONS OF THE FOUR REPORTS THAT I HAVE SUBMITTED TO THE COURT. NOTE: THERE HAS BEEN A FIFTH SUPPLEMENTAL REPORT WHICH IS IN YOUR MATERIALS.

THIRD: I WANT TO PLACE MY REPORTS IN CONTEXT

OFFICIAL INVOLVED WITH TRUST REFORM HAS AUTHORITY OVER ALL TRUST REFORM PROJECTS.

THIRD

BIA DATA CLEANUP, WITHOUT A MAJOR MANAGEMENT REORGANIZATION AND RESOURCE AND PERSONNEL ALLOCATION, WILL HOLD-UP TAAMS DEPLOYMENT, IF TAAMS CAN BE SUCCESSFULLY DEVELOPED, FOR YEARS TO COME. THERE IS NO SUFFICIENT ORGANIZATION, MANAGEMENT SUPERVISION, OR COMMUNICATIONS STRUCTURE TO EFFECTIVELY CARRY OUT DATA CLEANUP. NOR HAS THE COURT BEEN PROPERLY ADVISED OF THESE DATA CLEANUP PROBLEMS OR THE OVERALL STATUS AND COMPLETION SCHEDULE FOR DATA CLEANUP.

FOURTH AND FINALLY

JUDGE LAMBERTH HAS BEEN KEPT IN THE DARK ABOUT MOST IF NOT ALL OF THE PROBLEMS FACING THE INTERIOR DEFENDANTS THROUGH A SERIES OF INACCURATE AND INCOMPLETE QUARTERLY REPORTS. THE MOST RECENT OF THESE REPORTS FAILED TO REPORT ON PROBLEMS IN TRUST REFORM THAT THE INTERIOR DEFENDANTS WERE AWARE OF. PART OF THE PROBLEM IS THAT THEIR SENIOR MANAGEMENT HAVE NOT DETERMINED THE EXTENT OF THOSE PROBLEMS.

THE SPECIAL TRUSTEE WOULD NOT VERIFY THE ACCURACY OR COMPLETENESS OF THIS SEVENTH QUARTERLY REPORT NOR WOULD A NUMBER OF THE MANAGERS WHO SUBMITTED DATA FOR IT. BUT IT WAS STILL SUBMITTED TO THE COURT BY THE SECRETARY OF THE INTERIOR AND THE DEPARTMENT OF JUSTICE AS AN ACCURATE PORTRAYAL OF THE STATUS OF TRUST REFORM. THE SUPPLEMENTAL REPORT DEALT WITH THE INVOLVEMENT OF OOS IN THE PREPARATION OF THE SECOND AND THIRD REPORTS. THAT INVOLVEMENT LED TO THE QUESTIONABLE VERACITY OF THOSE REPORTS AND THEIR RECENT INVOLVEMENT IN THE SEVENTH REPORT'S FILING.

WHAT USE WILL JUDGE LAMBERTH MAKE OF MY REPORTS? ONE CAVEAT, MY CONCLUSIONS IN THE REPORTS ARE JUST THAT - *MY* CONCLUSIONS. THEY ARE NOT EVIDENCE ON WHICH THE COURT MAY ACT. THE COURT MUST REVIEW MY CONCLUSIONS AND FINDINGS AS THEY HAVE NOT BEEN INDEPENDENTLY CONFIRMED. THE PARTIES, DURING ANY HEARINGS BEFORE THE COURT. CAN CHALLENGE THEM. THE COURT MUST CARRY OUT A REVIEW OF THE EVIDENCE SUPPORTING ANY CLAIM A PARTY TO THIS LITIGATION MAKES BASED ON MY REPORTS.

WHAT IS THE SIGNIFICANCE THEN OF THESE REPORTS TO THE IIM ACCOUNT HOLDERS AND YOU?

IT SHOULD FIRST BE POINTED OUT THAT THE PRESENT ADMINISTRATION HAS NOT CONTESTED THE ACCURACY OF THE REPORTS FOR THE MOST PART. THEY WERE REQUIRED TO RESPOND TO THEM WITHIN TEN DAYS. THEY HAVE ADDRESSED THE FACT THAT SOME OF THE ACTIVITIES DID NOT OCCUR ON THEIR "WATCH." THEY ALSO HAVE

SPOKEN ABOUT THE AFFIRMATIVE ACTIONS THEY HAVE TAKEN TO BRING "MANAGEMENT REFORM" TO TRUST REFORM AS I AM SURE THEY WILL TALK ABOUT WITH YOU TODAY.

HOWEVER, IF WHAT I HAVE REPORTED IS EVEN PARTIALLY ACCURATE REGARDING THE MANAGEMENT AND SYSTEMS FAILURES THAT HAVE OCCURRED AND THE DOI IS PRESENTLY COPING WITH, TRUST REFORM IS YEARS FROM COMPLETION. UNTIL THESE ISSUES ARE SOLVED IN SOME MANNER, NO ACCURATE ACCOUNTING WILL BE ABLE TO BE PROVIDED BOTH INDIVIDUAL AND TRIBAL ACCOUNT HOLDERS.

THE MANAGEMENT SYSTEMS TO SUPPORT THE MANY FUNCTIONS REQUIRED TO MANAGE YOUR LAND AND INVESTMENTS WILL CONTINUE TO BE THOSE THAT YOUR LEADERSHIP HAVE CONSISTENTLY INFORMED ME DO NOT WORK, ALLOW FOR ERROR AND MISUSE, AND PERMIT TRIBAL AS WELL AS INDIVIDUAL FINANCIAL AND LAND MANAGEMENT TO BE INSUFFICIENTLY PERFORMED.

WHAT NOW?

I WILL CONTINUE TO MONITOR THE PROGRESS OF TRUST REFORM AND REVIEW ANY ACTIVITY THAT I BELIEVE REQUIRES FURTHER REPORTING TO THE COURT FOR THE BALANCE OF MY TERM OF ONE

Exhibit 3

THE COURT: All right. Mr. Gover may resume the stand.

MR. CLARK: May I make one remark on that?

THE COURT: Sure.

MR. CLARK: We have identified our next witness as Donna Erwin, who is traveling from Albuquerque.

THE COURT: Well, he said he'll make it this afternoon, so we'll know this afternoon before she flies.

MR. CLARK: Very well, Your Honor.

THE COURT: Good morning, Mr. Gover.

THE WITNESS: Good morning, Your Honor.

MR. CLARK: Good morning, Your Honor.

KEVIN GOVER, DEFENDANTS' WITNESS, PREVIOUSLY SWORN

DIRECT EXAMINATION (Continued)

BY MR. CLARK:

Q. Good morning, Mr. Gover.

A. Good morning.

Q. Are you ready to proceed, sir?

A. Yes.

Q. Now, at the end of yesterday's session, or toward the end, we talked about some the BIA's High Level Implementation Plan projects: appraisal, probate, TAAMS, the fractionated heirship interests questions. I would like to direct our conversation now to a different subject matter, and that is records management.

the --

THE WITNESS: Well, I thought that GAO pointed out some weaknesses in our system, in our entire process of developing the TAAMS system. The problem from our perspective -- there two big problems with the GAO report. One was that it was comparing us to some systems that are much different, like this Ulmar (ph. sp.) system, which was going to be built from the ground up. I mean, that was a design-and-build system, whereas we were using commercial off-the-shelf software, which in itself reduced a great deal of the risk.

The second was that, well, GAO is right. We could have done more research and more work before developing TAAMS that would have reduced the risk. There's no question about it. But if we had done that, then two years from now we would still not have a TAAMS system. We made a calculated judgment that it was worth the risk. We knew that there was a risk, but it was worth it to -- to expedite the deployment of TAAMS.

And that goes to a major point of the Secretary's and myself, that we only have control of this for the next year and a-half. If it's not done by January of 2001, I don't -- I don't have any control of what happens after that. We want to be so far along that there's no turning back by the time we leave office.

remember saying it.

Q. When you said that you -- to remedy the situation --

A. Like the deficiencies. I think -- I think I said it in terms of the deficiencies. For example, in here it says that we had not, at the time we issued the contract, developed an adequate list of the requirements of the TAAMS system. That's true. We had not. However, that list of requirements was developed later during the development of the TAAMS system, and TAAMS will meet the set of requirements that were later developed. So that's what I mean by --

THE COURT: But a lot of COTS systems go that way, don't they?

THE WITNESS: Of course.

THE COURT: You sort of refine your needs as you're trying to get the system going?

THE WITNESS: That's right, and even after it's deployed -- in Billings, for example, we're going to learn more about the system --

THE COURT: Right.

THE WITNESS: -- and know what more things we would like for it to be able to do, and the software will again be modified.

THE COURT: But under the GAO approach, they would prefer a design-and-build sort of a system, partly because

The Bureau is under pressure from my boss, the Secretary, and from OMB and from this Court, and what we have is -- for the first time that I am aware of, you have all three branches of Government actually joined in an objective, and that is what creates a unique opportunity. There is no opposition to movement forward on this of which I am aware, and so it is unique and I don't know that we'll have this opportunity again.

Q. You would agree that, I think, as you said that part of that, what is created as a unique opportunity, is the involvement of this litigation, the effect of this litigation?

A. Yes.

THE COURT: So it's not all bad.

THE WITNESS: It's not all bad.

BY MR. HARPER:

Q. Is part of this unique opportunity, the ability to get funding from Congress?

A. That's correct.

Q. Next week, I think it is next Friday that you anticipate that TAAMS will be rolling out. Am I correct on that?

A. Yes.

Q. Are you certain that the TTAMS is going to be working as you intend it to?

A. No.

Q. To make your assessments on the --

THE COURT: You would have had to be a fool to answer that one yes.

(Laughter.)

THE WITNESS: I learned better.

BY MR. HARPER:

Q. Particularly in regard -- because I remember the Secretary actually saying that you'll be moving to Billings for a while if that doesn't work; is that right?

A. That's right. The Secretary said I would stay there until it worked.

Q. Have you bought a house yet? You don't have to answer that.

In regards to TAAMS, is it Dom Nessi's assessments that you're primarily relying on, his reporting to you?

A. Yes.

Q. What happens if TAAMS doesn't work? What is the next step?

A. Well, if it's simply a matter that it doesn't work -- frankly, we expect bugs. In any software development, there are going to be some bugs. So it is not going to work perfectly next week.

We think that it will -- it will work, and the next few weeks after that will be dedicated to working out

those bugs.

We know the software works. We have already run it down in Dallas. We know the software works. So there is not really much chance of a catastrophic failure. However, it still requires a lot of testing over the next few months, and we have contracted for -- it's called IV&V, independent validation and verification, with an outside contractor from the Department to go and test the system, to ensure that in fact it works in accordance with the requirements.

If TAAMS -- the possibility of TAAMS not working simply is not on the table. Of TAAMS not doing everything that we hope it could do, that is still a live possibility, and we will continue to debug and otherwise modify the software until it can do what we want it to do.

Q. So, when you say that it is not on the table that TAAMS won't work, then are you -- you haven't really considered that possibility in your planning, then?

A. Not at this point.

Q. When you talk about bugs, are there any specific bugs that have been identified by folks within Interior?

A. There may well be. If there are, they haven't been shared with me. It would be lost on me to try to explain a technical issue, anyway, regarding a computer system.

Q. What about the vendor? Have they expressed any -- have they flagged any problems or potential problems?

screw up a record, didn't they?

MR. EICHNER: Yes, Your Honor.

So we're going to keep looking into it, and hopefully we'll just be able to, with future witnesses, clear those up. But we may need to call a systems person at DOI to straighten this all out. But we will keep looking into it and report back.

THE COURT: All right.

MR. EICHNER: Thank you.

THE COURT: You can call your next witness.

MR. CLARK: Good morning, Your Honor.

THE COURT: Good morning.

MR. CLARK: The United States calls Dominic Nessi.

DOMINIC ANGELO NESSI, DEFENDANTS' WITNESS, SWORN

THE COURT: Good morning.

THE WITNESS: Good morning.

MR. CLARK: May I proceed, Your Honor?

THE COURT: You may.

DIRECT EXAMINATION

BY MR. CLARK:

Q. Good morning, sir.

A. Good morning.

Q. Would you please state your full name for the record, and spell your first and last name, please.

A. My name is Dominic Angelo Nessi, D-o-m-i-n-i-c, and

Q. How about Applied -- did I get this wrong -- Applied TerraVision?

A. Applied TerraVision, their new company owner completed a system for the Canadian Band offices, which was somewhat similar to TAAMS, from what I understand.

Q. Now, again, because we're going to go through this in some detail, could you describe for the Court what the implementation schedule is for TAAMS, but with dates?

A. Well, in general, we began a pilot last week in the Billings office, which runs for a hundred days. That pilot is everything from unveiling the system to converting their data, rolling -- training of the staff, ironing out any issues that need to be ironed out, system testing, independent verification and validation. We'll implement a number of the agencies in the Billings office so that we can have a full functional test of the system. There will be more post-deployment clean. And we hope to have the overwhelming majority of Billings completed by around October 1st. At that point in time we have plans to go on to Juneau, Aberdeen, Minneapolis. We've already started working towards those. But, you know, they're tentative until we know that we have a good system that's well tested and ready to move forward.

Q. Is there some point at which a decision is going to be made about whether to continue on to these other areas?

A. Well, we'll have an official decision in approximately the last week of September, but we'll have a pretty firm idea well in advance of that.

Q. At the end, how many sites will TAAMS be available at?

A. At the end of this initial deployment period, it will be the 12 area offices, the central office, OTFM, 86 agency offices, and approximately 120 tribes.

Q. Is there a grand total you can give us?

A. It's about 230, I believe, 240.

Q. Do you consider the schedule for TAAMS to be aggressive?

A. Yes, I do.

Q. And is there a consequence to having such an aggressive schedule?

A. No, I don't believe there is a consequence to it. It required that we take appropriate measures to meet the deadline.

Q. Is there -- is there a -- are there problems associated with too long of an implementation of a complex computer system?

A. Every computer system has an optimum time for its design and development period. Going into TAAMS -- in general, you can take way too long. You could have a situation where you allow the users to constantly change the system, add new requirements, add their own personal desires

It's a very extensive tracking of when the appraisal is done, and who did it, and the results of the appraisal so that you can keep a historical record, and when an appraiser goes out, give him the kind of information that they need to see on similar pieces of Indian land.

Q. So it could provide what in residential housing is called comparables?

A. Yes.

Q. The next paragraph is TFAS and it's relationship. We've already talked about that. I'd like to skip over that and direct you to "F," which says in its first two sentences -- or first sentence, "TAAMS will require that BIA policies and procedures be consistent in regards to TAAMS operations."

Could you explain for the Court what that means, please?

A. Well, there's a lot of changes that TAAMS is going to bring into the Bureau of Indian Affairs, and they'll be everything from the way approvals are done on various transactions, to the way paper flows within the office. TAAMS has a very distinct separation of duties component to it, and -- I mean, TAAMS is a very powerful tool, and there has to be very concrete written policies and procedures so that the staff in the field understand how to properly utilize this. And also, TAAMS will enhance the business

process, and to take full advantage of the system, it's an opportunity for the Bureau to re-engineering some of its policies and procedures. So I would think that this will go on for a couple of years, that policies and procedures will come out in support of TAAMS.

Q. If I understand, would it be fair to say that TAAMS itself will impose some consistent policies and procedures?

A. Absolutely.

Q. All right. We're going to talk -- the next paragraph is "G," TAAMS training. We'll talk about that a little bit later.

Now, I have advanced to the next slide, talking about how TAAMS is one of the most important management efforts in BIA's history. Could you read into the record, please, the last paragraph there that says, "In fact"?

A. "In fact, the TMIP project is one of the federal government's 20 top management initiatives."

Q. What is the source for this statement, sir?

A. A discussion with the Office of Management and Budget. I believe they have a list -- they have a list of 20 top federal management initiatives, and this is one of them.

Q. We've advanced to the next slide here, which is headed, "What does TAAMS represent organizationally?" Would you describe why you put this in your presentation?

A. Well, as I said earlier, this is -- this presentation

trainers. So we have a training cadre of about 20 people that we can deploy to various sites around the country to do the training.

So these people get a very in-depth training. It lasts about 2-1/2 weeks, and in addition to just learning about TAAMS, we teach them how to be good trainers.

Q. So is it fair to say you are expanding your pool of people who are available to go out and teach about TAAMS?

A. Correct.

Q. Then, the last one, Decision to Proceed to Juneau, does this relate to your testimony from this morning about seeing whether what you've learned with Billings, whether to proceed with the other areas?

A. Right. The Billings pilot is not only about the system. It's about data cleanup. It's about data conversion. It's how best to do training, and as we go through this 100-day period, we have to make some decisions as to how much time we need to bring up an area office. Juneau is the next one on the stair step, and as I said, we'll know well in advance of this, but we'll make an official decision at the end of September.

Q. Okay. Now, with respect to the dates on here that precede today, has the TAAMS project missed any milestones?

A. Well, through the course of the project, yes, we have missed some milestones. It's very common in project

Q. Okay.

MR. CLARK: Unless His Honor has some questions in this area, I am going to ask that we skip the --

THE COURT: If you wouldn't, I wouldn't.

MR. CLARK: -- we skip the slides that relate to these individual programs. So if the operator could move forward to the one entitled Systems Testing.

BY MR. CLARK:

Q. I think your testimony has covered this in a fair amount. Let me direct your attention, though, to the second one, the user acceptance test team. Is this the one that you've referenced will start next week under the new milestones?

A. Yes. This really covers our entire test package.

Q. In other words, that's going to start next week? Or, maybe I have my weeks off.

A. Well, this outlines all of the pre-implementation activities. I mean, the initial testing began with the vendor itself. They do individual module testing of each piece of TAAMS. Then, they do integration testing, which is the entire system put together.

Our user acceptance testing begins next week. While the -- last week and this week, we're putting in some sample transactions into TAAMS. At the same time, we're putting them into Legacy systems so we can see -- I mean,

for instance, we want to make sure that TAAMS interfaces with TFAS the way IRMS interfaces with TFAS.

Then we test it all again. Everything that we're doing between now and August 1st, we're going to do again for the IV&V contractor after August 1st.

Q. Okay. We'll talk about that in a minute, but let me get your explanation of the phrase "during the parallel processing period." Does this refer to what you just testified about with running the data in both the Legacy systems and in TAAMS?

A. That's correct.

Q. So that's the parallel?

A. That's correct.

MR. CLARK: If we could have the next screen.

BY MR. CLARK:

Q. This screen is entitled: To Take Full Advantage of the Benefits a Modern Information System Can Provide, It is Essential that the System Be Incorporated Into Every Aspect of the Business Process." Can you explain that to us, please?

A. Well, this is -- this is trying to get my point across to the people that I'm -- the BIA staff that I'm showing this presentation to.

My feeling is that in order to make TAAMS really part of what they do, you need to put it right in

AFTERNOON SESSION

(1:48 p.m.)

DAVID ROBERT ORR, DEFENDANTS' WITNESS, RESUMES STAND

DIRECT EXAMINATION (Continued)

BY MR. SHUEY:

Q. Before we broke, Mr. Orr, you were going to show us the tract icon, and I think you had testified about this function and the issuance of a certified title report. Could you enter the tract function.

A. Yes.

Q. And you had explained the button bar up at the top --

A. Yes.

Q. -- and the fact that there was a certify option on that button bar.

A. Yes.

Q. Does the functionality under this option allow you to get land records certified?

A. Well, it allows you to flag that a land record has been certified, but the computer system can't actually make a certification decision. Obviously, the land record title office manager is the only person that can really put a certified title out.

Q. And once a certified title report has been approved by a land records manager, does the system have the capability to issue such a report?

MR. GINGOLD: Thank you, Your Honor.

MS. BABBY: Can I give you -- I'll give you a list.

MR. SHUEY: Okay. We can look and see what he asks for, but I would like to repeat that there hasn't been any specific request for --

THE COURT: I understand. He just made it. I'm not trying to rule on any prior. He made it now. I said can't you give them to them --

MR. SHUEY: Sure.

THE COURT: -- and tell me when you can do it.

(End of discussion at the bench.)

THE COURT: I'm a little nervous in talking to you because I actually think I understood everything you said today, and it makes me a little scary because I know a little knowledge is dangerous.

You said this is an aggressive roll-out schedule. What do you think are the things that could interfere with continuing to roll out this way?

Obviously, if the users don't like next week what you've done so far --

THE WITNESS: Yes.

THE COURT: But that would only be probably a temporary delay while you tried to adjust to the things they think they need, right?

PROCEEDINGS

THE DEPUTY CLERK: Civil Action Number 96-1285, Elouise Cobell, et al., v. Bruce Babbitt, et al.

MR. CLARK: Good morning, Your Honor.

THE COURT: Good morning.

MR. CLARK: May I proceed?

THE COURT: You may.

MR. CLARK: The United States calls Thomas Thompson.

THOMAS MARTIN THOMPSON, DEFENDANTS' WITNESS, SWORN

DIRECT EXAMINATION

BY MR. CLARK:

Q. Good morning, sir.

A. Good morning.

Q. Would you please state your full name for the record and spell your last name?

A. Thomas Martin Thompson, T-H-O-M-P-S-O-N.

Q. Mr. Thompson, are you currently employed?

A. Yes.

Q. Where?

A. The Department of Interior.

Q. What is your title?

A. Principal Deputy Special Trustee.

Q. Do you hold any other titles?

A. Right now, I'm the Acting Special Trustee.

that capacity prior to this as you were marshalling the various pieces of the HLIP?

A. Yeah, as of August 22, 1997, I felt I had that job.

Q. Now, you mentioned risk a few answers back. Could you identify for the Court, please, what you mean by that? You said you identified risks.

A. Yes. Well, in this case here what I was trying to point out was that contrary to the approach that I had proposed, which was to break up a large problem into many smaller problems and proceed against each of those, the BIA and their contractor had decided to combine three of the projects, and that gave me concerns. That increased, to my mind, the risk of success in completing the projects.

Q. Okay. What were those three projects -- subprojects, excuse me?

A. It dealt with BIA data cleanup, and with the decision to combine the TAAMS system development with what is called the land records information system development. That's the land title system that BIA currently uses.

Q. Okay. Now, were there -- is that the extent of the risk that you identified? I mean, did you have concerns about the pace, for example?

A. Well, the way the thing was rolling out on these system development pieces, the schedule was highly compressed. There was very little time in my mind to finish

the work between the time we published the high level plan and when the final action was due, which was 12 months away. I pointed out that we had taken a couple of years, in the case of OST, to get to that same point, and that assuming and thinking that the work in BIA was going to be more complex, that that time frame was going to be tough.

Q. Now, I think you testified earlier that these remarks or identification of issues were considered by Department management; is that right?

A. They were.

Q. Okay. Notwithstanding the nature of your position, do you think that it's a legitimate approach that the one that resulted in not accepting your recommendation, and instead accepting the plans proposed by BIA?

A. Management can accept any amount of risk that they're willing to manage. In this case, the decision was taken to move forward.

Q. So what I'm getting at, I mean, this is -- this was not ignored, your identification of this risk, but as a result of a legitimate disagreement, a different decision was made?

A. That's correct.

THE COURT: It still doesn't make them right; right?

THE WITNESS: Time will tell, Your Honor.

There are a number of other groups that meet, obviously, like the Assistant Secretary's biweekly meeting. We use contractors to oversight, Macro International. We've used Mitretek in the past to check on progress and see where things are going.

Q. Okay. And do you consider -- are there other oversight efforts, like outside of the Department of Interior?

A. Oh, yes. The General Accounting Office has been engaged from the very start, more so in the recent months obviously. There's been some interest in what we've been doing by the Department of Justice. The IG is involved. We use, of course, the advisory board and the Intertribal Monitoring Association. I meet and brief them about what's going on. I spend a lot of time on the road talking to tribal groups and Indian resource groups, like the Intertribal Timber Council, oil and gas groups, things like that, explaining what this is all about.

Q. And how about on the Hill, other than GAO?

A. Oh, yes, on the Hill also, both in oversight committee and appropriations committees.

Q. Now, given your experience as a project manager of the TMIP, as well as your other project management things you've talked about, is it appropriate or common in your experience that in a complex management environment the

plans change?

A. Yes. You can pretty much say that once a plan is published, it's outdated, and so you need to start working on the next one.

Q. And what is it that makes that common? Can you describe that?

A. Well, there's changes in the resource availability, the people, the budget. You have interferences on schedule. You learn things you hadn't thought about. You plan to take care of 80 percent, and then you spend all your time managing the other 20 percent.

Q. So you meet conditions sometimes you didn't expect, that sort of thing?

A. Oh, yes.

Q. And sometimes you find better ways of doing things?

A. Yes, indeed.

MR. CLARK: Your Honor, at this time I would like to pass up a document that I am going to be using because it contains a good deal of detailed information about HLIP revisions. Because of the lateness of the document, it could not be included on our pretrial statement, and I won't be moving it's admission unless I get a stipulation. I've not had an opportunity to discuss this with opposing counsel, and that's my fault. But I would like to put it before the witness to guide him through this as to the

AFTERNOON SESSION

(1:51 p.m.)

MR. CLARK: May I proceed, Your Honor?

THE COURT: You may.

MR. CLARK: As a preliminary matter, just before the lunch break, I marked for identification as Defendants' 100 a certain exhibit that starts out "Statement of Work." That in fact has been admitted already, Your Honor, as Defendants' 83. So we should probably reserve 100 for another exhibit.

THE COURT: All right. Eighty-three?

MR. CLARK: Correct, Your Honor.

THE COURT: Okay.

(Whereupon, Defendants' Exhibit Number 100, previously marked for identification, was withdrawn.)

THOMAS THOMPSON, DEFENDANTS' WITNESS, RESUMES STAND

DIRECT EXAMINATION (Continued)

BY MR. CLARK:

Q. Mr. Thompson, do you have the Statement of Work before you?

A. For IV&V, yes.

Q. Okay. First of all, can you tell the Court what an IV&V is and what it is an IV&V of?

A. In this case, independent verification and validation is a process that's used at the back end of a systems

development project to ensure that what was requested, was in fact that delivered. It's performed by an independent or an outside group of the actual system as it comes up and as a run-on.

This case here, this is for the TAAMS project.

Q. Did you have a role in the obtaining of this IV&V for the TAAMS system?

A. Yes. As we talked about some things to mitigate risk in the development of TAAMS and roll-out of TAAMS, one of the vehicles that we decided on was to use an IV&V approach, independent verification and validation. We discussed that in management meetings, talked about when it was going to occur, what it would encompass, and I worked with the Chief Information Officer with the Assistant Secretary of PMB to develop this approach, this contract. The Special Trustee's role is to fund it.

Q. So this was the product, then, of several people taking a look at the TAAMS project and deciding this was necessary or a good idea at least?

A. A good idea, yes.

Q. If you could direct your attention over to page 4 of this document. There is a bullet there that reads Task 1.

A. Yes.

Q. Could you read that into the record?

A. Task 1, "Verify and validate the TAAMS system for

deployment."

Q. Now, do you have a general familiarity with this task?

A. Generally.

Q. Could you give us your general understanding?

A. Well, it's essentially a first look to decide of TAAMS was really ready to go. They look at various things like whether the users are comfortable with it, whether they can use it, whether it's been adequately tested, things like this, basic systems development backup to provide an independent assessment.

Q. When you say "ready to go," could you explain what you mean by that?

A. Well, basically, is the system designed, is it functioning as asked, is it meeting the parameters for speed, has the training been delivered, things like this.

Q. But does it mean -- does "ready to go" include within it "ready to be deployed"?

A. In this case here, Task 1 was kind of a pre-deployment piece. It's part of a preliminary look to bring the contractors in early enough so that they can observe the roll-out and the initial implementation of TAAMS in the Billings area. There will be a more detailed look as you go along, and then they will offer an assessment back to the Department.

Q. But this is at least an early look at whether it's

PROCEEDINGS

THE DEPUTY CLERK: In the matter of Elouise Cobell, et al., v. Bruce Babbitt, Secretary of the Interior, Civil Action 96-1285.

THE COURT: Mr. Clark.

MR. CLARK: May I proceed, Your Honor?

THE COURT: You may.

MR. CLARK: The United States calls Bruce Babbitt to the stand.

BRUCE EDWARD BABBITT, DEFENDANTS' WITNESS, SWORN

DIRECT EXAMINATION

BY MR. CLARK:

Q. Good morning, sir.

A. Good morning.

Q. Would you state your full name for the record, please, and spell your last name?

A. Yes. My full name Bruce Edward Babbitt, B-a-b-b-i-t-t.

Q. Thank you. Are you employed, sir?

A. I am.

Q. Would you please give us your title?

A. I am the Secretary of the Interior.

Q. Sir, have you served in state government?

A. I have.

Q. And would you describe generally the positions you've

recollection of my precise recollection of exactly what was on my mind when I signed this. It does -- you see, I think at this time the decision had apparently not been made to acquire the specific system that was subsequently acquired, and I think what I'm saying in this memorandum, implicit in this is, I'm ready to go with a commercial, off-the-shelf, general trust management system to the extent practical. And what I'm saying is, let's get on with this and move it. Let's get everybody together and get a process to get the COTS stuff, pilot and implement.

Q. And is this what has been referred to in this court as the ArtesiaLand system?

A. That's correct.

Q. This was ultimately -- I mean, not at this point in time, but that's ultimately --

A. It's what subsequently evolved from this, yes.

Q. And you have a sentence here, quote, "Following successful testing and piloting, full implementation will proceed."

To your knowledge, has piloting occurred?

A. It is occurring in the Billings area.

Q. Is it your understanding that full implementation will follow?

A. Well, just with this qualification. The pilot is not yet signed off. I was up there several weeks ago, and I had

a chance to -- well, the usual suspects were all there: Mr. Orr, the Artesia people, the other Artesia people; the BIA people, Dom Nessi, all of the people involved in this. We got a very strong feeling from talking to all of those people that this thing was really right on. But at the same time everybody agrees that for a couple of two, three months, we've got these outside critics in watching, and we're not going to make a final decision until September because we did, I think, very appropriately, sort of get some outside, you know, kind of a blue team or a red team, whichever, to kind of look at this thing and critique it.

Now, my understanding of this is that by sometime in September we'll be ready to make the implementation across the board decision.

Q. And is it your understanding that as of this time Mr. Homan was in agreement with you with proceeding on this?

A. Yes.

Q. Now, if you could turn over to the next page. It's a paragraph entitled, "Related Activities," and I'll read it for you. Quote, "Supporting" activities "will also be evaluated, to include a joint trust records management solution," paren, "(which may include electronic records/imaging technology)," close paren, "developing and issuing policy and procedures manuals, providing staff and user training, and improving internal controls."

Your Honor, it will take me a moment to --

THE COURT: All right.

(Brief pause in proceedings.)

MR. CLARK: Your Honor, there are several references in the transcript to this subject matter. I am only highlighting one at this point, and that appears on page 3853 roughly lines 6 through 15.

BY MR. CLARK:

Q. And if you need to see this, Mr. Secretary, feel free to ask me. But, in general, I just wanted to introduce the -- to see if you recall, in general, the discussion about this August 22 memorandum, and later in the conversation, on the next page, in fact, 3854, the conversation about the HLIP. And in response to a question posed by plaintiffs' counsel, which reads: "And you say a marching document. Is that something like dynamic, dynamic process that it's ongoing?"

And you said, "Oh, sure."

And I want you to clarify for the Court, if you would, what you meant by that. And furthermore, was this with respect to the August 22 memo which you characterized as a marching order, or the HLIP?

A. The distinction in my mind is that the August 22 memo was intended to close the process of consideration that flowed out of the strategic plan, and to the extent that it

is characterized as a dynamic document, I would readily concede that -- or I would tell you that my conception of that is that I have to go back out through the kind of -- some kind of rather formal process because that is kind of, in my view, not only the marching orders, but the decision document that I don't just change by sort of picking up the phone.

The high level -- but, nonetheless, you know, I'm perfectly prepared to go back into that. It hasn't been necessary because the high level implementation plan is, by consent of all, a truly dynamic document. I mean, it should be under revision all the time.

Q. And yesterday -- we're moving from yesterday's cross-examination to my questioning of you. Toward the end, as I recall, you introduced to the Court an experience you had had in the State of Arizona involving some judicial decree or judicial order, and an approach that was taken there. Do you recall that?

A. I do.

Q. And this is in the prison context?

A. Yes.

Q. Would you tell the Court whether or not you believed that testimony and that experience is directly applicable here?

A. The circumstances here are quite different. I am not

you know, try to design everything, but I would be perfectly happy to come back to this Court before this trial wraps up and just submit a piece a paper and say, "Here's a proposal of what I would be willing to do by institutionalizing a forum for turning this adversary process into cooperation and positive advice. I just leave you for -- I'll leave all the parties for some thought about that.

THE COURT: That's very constructive.

THE WITNESS: Thank you.

MR. CLARK: Your Honor, I have no further questions at this time.

BY MR. CLARK:

Q. Thank you, Mr. Secretary.

THE COURT: Any recross?

RECROSS-EXAMINATION

BY MR. LEVITAS:

Q. Mr. Babbitt, I don't think it is appropriate for me to respond to your statement at this point, and so my failure to do so should not be taken by you or the Court as not accepting that as a good faith statement.

A. Thank you.

Q. I just have a few questions in conclusion.

After the trial yesterday adjourned, did you have occasion to discuss your testimony with anyone?

A. After the trial adjourned, I declined my counsel's

Exhibit 4

TAAMS MEETING
WEDNESDAY, SEPTEMBER 08, 1999 2:00 PM

ATTENDEES: Shields, Gover, Berry, Lamb, Thompson, White

PURPOSE: Discuss current TAAMS status and agree on Departmental Policy Position

BACKGROUND:

-Secretary Unveiled TAAMS in Billings On June 25, the announced beginning of a two month Pilot

-Conversion of current BIA Data has been repeatedly delayed due to numerous problems

-BIA has been reluctant to share information with the Special Trustee and Chief Information Officer

-Indian Affairs has been continuously upbeat in public (e.g. self nomination for award given by Government Computer News and various newspaper articles)

CURRENT STATUS: In effect, the TAAMS pilot is just beginning

DEPARTMENTAL POSITION: The Department needs to develop a unified position based on where the BIA actually is in the TAAMS effort

OUTSIDE NOTIFICATION: The Department needs to quickly inform:

-U.S. District Court Judge Royce Lamberth

And immediately thereafter;:

-The Appropriations and authorizing Committees of Congress

OVERSIGHT: BIA needs to be completely forthcoming with the Special Trustee and the Chief Information Officer on the actual status of TAAMS on a real time basis in the future

Exhibit 5

Cobell - E Mails

Date: 9/9/99 8:37 AM
Sender: Anne Shields
To: EDWARD COHEN
Priority: Normal
Subject: TAAMS

I met with folks yesterday about the TAAMS schedule and whether there was a need
to notify the court of any changes. Did you know about the meeting and decide not to come or what? Anyway, while the consensus was that no one had testified
to an exact schedule so we probably don't have to correct anything, everyone thinks that the court has the schedule in some of the documens and since we will
be giving the Hill clarification, we should give it to the court as well. Dom said that he had send a one-pager to SOL (I have a copy) which should suffice. Dom seems to think we are reaching our goals in a timely fashion, that everyone
should expect changes along the way. The biggest issue seems to be the need for
intensive training for users so that they know how to use the system and are confident that they know how so they will use it. That is under way.

Exhibit 6

Attachment
Since July 1 doc

Since July 1, 1999 (approx), the schedule for the modification and deployment of the Trust Asset and Accounting Management System (TAAMS) has undergone three revisions.

First, the system was unveiled on June 25, 1999 in the Billings Area Office as scheduled. Originally, it was planned that the Billings area agency offices would be deployed two at a time over the next two months, with the final agency being deployed in early September.

The schedule was revised to postpone actual operations in Billings and the phased deployment to the agencies in lieu of investing more time in the system testing and data conversion processes during July and August. A deployment to the Billings Area Office and all agency offices at one time is scheduled for September 7 – 15, 1999. The impact on the over-all schedule is negligible as all agencies will be operational on the same dates as the earlier schedule.

The Billings Pilot will continue until TAAMS is fully incorporated into the operational environment of the Office. This will include documenting how the workflow processes have been revised to take advantage of the new system, as well as populating the new system with additional data that was not required in the legacy systems but is required in TAAMS. As a result, the pilot may extend beyond the point in time when the Billings Area discontinues entering data into the legacy systems and the Department decides to initiate deployment of TAAMS to other offices.

Second, the original decision to conduct the final system test, observed by an independent verification and validation contractor was scheduled for September 13, 1999. The logistical requirements of deploying all of the Billings sites in a two week period will require a substantial outlay of human resources during that period and it would not possible to conduct a thorough system test without a full team from the vendor and the users available to process the test scripts. Therefore, the system test is scheduled for September 27, 1999 in order to ensure that adequate personnel are available. The two-week rescheduling will require a similar revision to the Department's date for expanding the scope for deployment activities to other sites.

Third, the earlier deployment schedule was completely geographic-based with Area Offices being deployed in their entirety for all functions. The schedule has been tentatively revised (final decision to be made September 13, 1999) to implement the Title Plants in all geographic areas during the period of November and December. This change was considered for the following reasons:

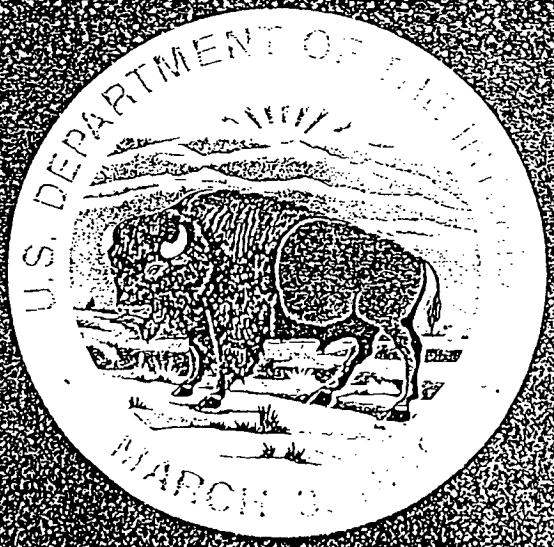
- Implementing a single major function across the BIA will allow a more focused integration of the new system into existing business processes.
- It will eliminate the necessity for BIA title plants having to use two systems for processing BIA Inventory Reports for probate purposes.
- Permit the BIA to realize cost-savings by eliminating the LRIS earlier for which the BIA pays usage fees to the USGS.
- Simplify the data conversion process by transferring data from one system (LRIS then IRMS) to TAAMS rather than two at one time.

Exhibit 7

TRUST MANAGEMENT IMPROVEMENT PROJECT

UNITED STATES DEPARTMENT OF THE INTERIOR

HIGH LEVEL IMPLEMENTATION PLAN



REVISED AND UPDATED
FEBRUARY 29, 2000

6. TRUST ASSET AND ACCOUNTING MANAGEMENT SYSTEM (TAAMS)

I Responsible Official

The BIA Deputy Commissioner for Indian Affairs is the responsible official for this subproject. Dominic Nessi, Special Assistant to the Assistant Secretary for Indian Affairs, is the subproject manager responsible for coordinating work occurring at BIA Headquarters, Regional and Agency offices.

II Statement of the Problem

The basic tools that DOI uses to manage Indian trust assets must be upgraded. Proven automated application sources for many of these basic trust functions are commercially available.

The Trust Asset and Accounting Management System (TAAMS) that will replace existing systems is comprised of a modified commercial off-the-shelf general trust asset management system. The TAAMS system will include master lease, billing and accounts receivable, collection subsystems, and land title functions.

Legacy Systems

There are currently two BIA-wide automated systems used to manage Indian trust assets: the Land Records Information System (LRIS), and the Integrated Records Management System (IRMS).

LRIS supports the land title function by providing land title-related information e.g. ownership and encumbrances. It calculates ownership interests (in fractional and decimal forms) used by Agencies for distribution of land revenue.

IRMS supports the land resource management function and is primarily used at the Agency level for generating lease bills and for income/revenue distribution to Indian owners. It contains information on Indians (People File), Leases (i.e., pasture, range, timber, mineral mining), land ownership, oil and gas royalties, and IIM accounts.

Several of the Regions use locally developed and maintained systems to support the leasing and disbursement process. Others perform this function manually and do not use any automated systems.

Legacy System Shortcomings

The information contained in each of these modules is entered manually, contains duplicate data elements, and is not integrated or cross-checked for consistency. As a result, the same data has the potential of being inconsistently maintained by each module.

LRIS and IRMS are not integrated, have no electronic interfaces and duplicate much of the same information (i.e., ownership, land, and leases/encumbrances). This increases the chance of data-entry errors and the potential for inconsistency in the information contained in each system. Neither LRIS nor IRMS fully or adequately support all the activities of the land title and resource management functions performed at the Land Title Records Office (LTRO) or Agency levels.

Observations on TAAMS Initiative

The original plan for modification and deployment of TAAMS has undergone considerable change since the unveiling of the initial prototype in June 1999. Much of this change has occurred as the project has evolved and the system requirements have become better defined by the user community.

The original HLIP and the TAAMS contract foresaw the purchase of an off-the-shelf system with minor modification. This approach was intended to "jump-start" development activity as quickly as possible. From that perspective, the Department's approach was effective. However, initiating such a quick development effort required that a special effort be made to ensure that critical information engineering tasks be conducted concurrently or, in some cases, out of sequence with a traditional system development method. Because the contract lacked specific design requirements, the Department acknowledged that its risk could be far greater than would normally be found in a more traditional information technology initiative. However, when weighed against the risk of delay associated with traditional system development methods, the Department believes that it chose the proper course of action and that proper risk mitigation could be accomplished. Listed below is a series of observations based on the experience gained during the first year of the TAAMS initiative.

As a result of a limited amount of pre-planning and development of a precise design specification and requirement, the BIA chose to modify TAAMS using an "evolutionary prototyping" method for rapid development. This method is a user-centric design effort that allows for the development of numerous system releases, each one closer to the final target than the last. This is an accepted process for rapid system development and helps to ensure that the user community has a significant opportunity for input on the design.

One of the most important observations made after the first prototype was released in mid-summer 1999 was that the initial design meetings did not fully capture the entire scope of the BIA's needed functionality. Furthermore, it became apparent that the lack of consistent business rules and processes across the BIA (many resulting from statutes and probate laws that vary from state to state) placed the software vendor in a very difficult position as it attempted to modify the software to meet the BIA's needs. Although it was always assumed that additional adjustments would be necessary after the first prototype, it was initially believed that a large part of the basic functionality was present in the late-June 1999 release of TAAMS. This was not the case and it became apparent during the system tests conducted with BIA users during July and August 1999 that a significant level of analysis and system modification remained in order to ensure that all of the BIA's unique business functions were addressed.

The combined impact of these two factors was that many more releases would be necessary than originally anticipated when the initial prototype was released. Throughout this period, the TAAMS team would project that the "next" version would satisfactorily meet the core functionality of the users, only to find that the users determined that additional modification was

necessary. It should be noted that BIA staff have limited experience in system design and it is not surprising that they would not be able to articulate their needs without a significant level of interaction with the software vendor – a level of interaction that often competed with other pressing demands for their time.

As a result, in order to more clearly define the core requirements, the software vendor and TAAMS team began to focus primarily on the needs of the Billings Regional Office with a reduced level of input from other BIA regions. Chosen as the pilot, Billings represented a good target for TAAMS because their workload represented the overwhelming majority of types of realty transactions and their workforce followed the most common BIA realty practices.

An unanticipated result of the frequent version releases was that the data migration did not have a consistent target from July 1999 through approximately September 1999. As a result, test conversions would have to be adjusted every time the underlying data structure was adjusted. With versions being released in a rapid manner, there were times when system testing was difficult because the data did not properly match the data structure.

Furthermore, while the Billings data was sufficient for the legacy systems, it required significant modification for the TAAMS database structure. For example, fee owners in the legacy system did not need a unique identifier. However, in TAAMS, a unique identifier was necessary to ensure database normalization. This necessitated both an immediate business rule decision and a conversion process that would create a unique identifier. Each time a new version was released, all of these features would need to be reviewed to ensure that they did not conflict with some aspect of TAAMS previously decided upon.

Another unanticipated result of the design effort was that it did not lend itself to system testing in the traditional sense. Testing was conducted continuously after each version was released. However, the data conversion issues discussed above oftentimes interfered with a full test. Unit, integration and system testing was conducted routinely by the software vendor throughout the modification process.

Similarly, training was conducted frequently during the summer and early fall 1999 for BIA regional personnel with the expectation that the last release would be the final release. Training often illustrated that the latest release did not meet the user's needs and also that business rules continued to need refinement. An important lesson learned during the training effort was that the legacy systems and TAAMS were so different in approach, technology and concept that longer, more intensive training classes than originally considered would be required. A new concept for training emerged that is now being implemented. A central facility will be used for all training – the Applied Terravision System, Inc. (ATS) facility in Dallas – with the instructors provided by ATS. BIA co-trainers will be available to answer questions about the business aspects of TAAMS, whereas ATS instructors will teach the proper use of the software.

The net result of these events during the late summer and early fall was that the deployment schedule outlined in the TAAMS contract could not be achieved as

originally planned. In retrospect, the Department concedes that the plan was overly optimistic given the complexity of the task at hand. Nonetheless, the progress achieved could not have been accomplished without this direct attack on the problem and, of course, the initiative and cooperation of hundreds of BIA staff and contractor employees across the country.

Other Observations

An aspect of the TAAMS initiative that does not fall under TAAMS per se, but certainly has a major impact on the performance of the system, is the BIA's telecommunications infrastructure. In the process of being upgraded as TAAMS was being deployed to Billings, the BIA's wide-area network (BIANET) has posed some performance issues. The frame relay wide-area network should eventually provide the necessary framework for a successful telecommunications structure. However, "band-width" is not the only part of the equation that must be addressed. BIA local area networks, routers, and even the desktop PCs must be properly "tuned" to meet the requirements of a high performance software product that transfers large quantities of data for processing. This analysis and upgrade continues to the extent that resources are available. Continued improvement in the BIANET must be an integral component of a successful TAAMS initiative. In order to address the performance issues of BIANET, the Department is developing a comprehensive approach to addressing network issues, using Departmental, BIA and contracting staff to thoroughly review, analyze and correct outstanding network issues. An initial plan has been delivered to the BIA and the contractor has begun gathering initial network information.

The Department's trust business processes need substantial review and standardization in order to take advantage of the efficiencies and flexibilities provided by modern software. This review process, like TAAMS, is on a fast-track for completion. However, given that the policies and procedures subproject has not yet reached key conclusions, the TAAMS design team working with the system owner and user community had to make basic programmatic assumptions that may eventually require further system modification. The benefit of TAAMS is that its flexible design will allow for such changes.

The interface between TAAMS, TFAS and MMS is complicated, not from a technology perspective, but because the three systems have different owners, different software vendors and different program objectives. In retrospect, the plan to purchase two off-the-shelf systems independently (TAAMS and TFAS) and interface them with an existing system (MMS) had inherent difficulties from its inception. This challenge will be met, but it will require significant interaction between the organizations at both the upper management and system levels in the next two to three months.

The information management culture in the BIA must be modernized to understand how modern information systems are managed. The TAAMS initiative has spawned the creation of configuration management and control boards, a field user group, the BIA's first full-time system manager and a system of regional data administrators. While

these components will some day be commonplace in BIA, today management and staff are just beginning to learn new concepts and processes and taking on new responsibilities for data and system management.

Through TAAMS, the BIA created an internal capacity for IT project management that it did not previously have. The Department of Interior does not have standards for IT project management, necessitating the BIA to develop its own standards as the initiative proceeded. As a result, BIA will reap future benefits as it continues to develop and manage IT projects. The "cost" was that the TAAMS Project Management Team was required to create a series of plans and documents for the management of TAAMS. This was a time and resource consuming activity that future project management efforts will not have to undertake.

Data conversion at future BIA and tribal sites will continue to be a challenge. Because each BIA office modified the legacy systems to fit their own needs and each legacy database is different, the TAAMS team cannot develop just one "data map" to fit all circumstances. Tribes which have already developed their own systems will have an even greater challenge.

The challenge will be for the TAAMS project team to develop a replicable process based on the experiences from the Rocky Mountan Region pilot. This task is achievable, but it will take a significant level of coordination between different contractors and the BIA users.

III Statement of Objectives and Outcomes

Over the last several years, BIA has undertaken several efforts to evaluate updating or replacing the current LRIS system. In 1998, a decision was made - predicated on an LRIS study by TRW and Lockheed-Martin - to replace LRIS with modern software. Initially LRIS was to have been developed in tandem with the new TAAMS. Subsequently, a decision was made to eliminate LRIS completely and include its functionality in TAAMS based on the following:

- The current LRIS system does not efficiently support BIA processes and is partly responsible for bottlenecks and backlogs related to title information;
- Significant problems are caused by the lack of integration of the current LRIS and IRMS systems (TAAMS is now planned as the replacement for IRMS and LRIS). For example, ownership and lease information must be entered manually in both systems as separate efforts;
- There is significant duplication of data between these two systems without any capability to transfer or synchronize data automatically. As a result, the data is inconsistent between the two systems and there is no efficient way at present to resolve these inconsistencies;
- The LRIS system is based on obsolete technology that is very costly to enhance or repair.

The BIA, in cooperation with the Office of the Special Trustee (OST) and in coordination with the Department's CIO and

Office of Information Resources Management, BLM and MMS, is acquiring, modifying (as necessary), testing and piloting standardized, commercial off-the-shelf land management system software. Interfacing with the Trust Funds Accounting System described above, this trust management system will comprise TAAMS. The TAAMS system will include an asset management system with a master lease subsystem, a billing and accounts receivable subsystem, and a collection subsystem. TAAMS will also have a probate tracking system in a future release.

A pilot site (Rocky Mountain Region/Billings, MT) was identified and the site's data has been cleaned and converted. The conversion process used both internal and contractor support. The approach used procurement and piloting protocols appropriate to a proven, modified commercially leased, operated, and maintained off-the-shelf standard trust asset management system, to process trust data generated nationally from over 221 BIA and Tribal field locations. The system selected will be commercially operated and maintained. Prior to the decision to extend the system nationally, the system will be piloted successfully at the Rocky Mountain Regional Office.

IV Relationship to Reform Act of 1994

TAAMS will help to address the following provisions of the American Indian Trust Fund Management Reform Act of 1994 (Section 101):

- Providing adequate systems for accounting for and reporting trust fund balances.
- Providing adequate controls over receipts and disbursements.
- Providing periodic, timely reconciliations to assure the accuracy of accounts.
- Determining accurate cash balances.
- Preparing and supplying account holders with periodic statements of their account performance and with balances of their account which shall be available on a daily basis.
- Appropriately managing the natural resources located within the boundaries of Indian reservations and trust lands.
- Preparing accurate and timely reports to account holders on a periodic basis regarding all collections, disbursements, investments, and return on investments related to their trust accounts.
- Maintaining complete, accurate and timely data regarding the ownership and lease of Indian lands.

V Relationship to Other HLIP Subprojects

BIA Data Cleanup and TAAMS activities are closely related and for that reason these two subprojects are being jointly managed.

From a system perspective, TAAMS has its closest link to TFAS owing to the need for consistent data for individual Indian or Tribal accounts that are common to both systems and to accommodate transactions that have an impact on accounts in both systems.

Other subprojects that have significant effects on TAAMS include Probate (changes affecting status of data and accounts), Records Management (storage and disposition of information), Policies and Procedures (multifaceted effects), Training (proper use of system, reporting protocols, data entry rules, etc.), and Internal Controls (findings and recommendations for improvement and risk reduction).

VI Subproject Budget

The estimated project budget for TAAMS includes system modification, development and deployment; training services; service bureau operations and other costs associated with the on-going operation of TAAMS.

SUBPROJECT BUDGET TAAMS				
Fiscal Year	FY 1997/ 1998	FY 1999	FY 2000	FY 2001
$$ in millions	–	8.1	18.4	12.9

VII Subproject Action Plan

The particular tasks and milestones necessary to successfully complete this subproject include the following:

A. Select Pilot Site

A decision was made in 1997 to pilot and test the new Trust Asset and Accounting Management System (TAAMS) initially at one BIA Regional Office location before the system is installed at all BIA and OST locations. The BIA and OST jointly developed criteria for selection of a suitable system pilot site, considering the following:

- Whether the Area was representative in terms of Tribal, IIM and Special Deposit accounts, trust assets and land management issues, Tribal contracting, and income types;
- Information about the status of previous or on-going records cleanup efforts in the areas of trust management records, BIA trust asset and land title records; and Hearings and Appeals probate backlogs;
- The general receptivity of Area Management and Indian representatives;
- Staff knowledge of automation,policies and procedures, trust management, etc.;
- Logistical considerations such as telecommunications, geography, and costs.

This task was completed on November 13, 1997, with a decision by the Secretary's Trust Management Improvement Steering Committee to use the Rocky Mountain Region for the pilot site.

B. Acquire External Professional Consulting Services

Three Native American 8(a) management/ technology firms were selected in December 1998 to provide day-to-day support to the TAAMS project team. An additional firm was procured to provide

assistance in developing data dictionaries and data conversion techniques. The BIA will continue to utilize outside assistance as it becomes necessary to supplement internal resources. *All external consulting services were procured on schedule by March 31, 1999.*

C. Assemble Senior BIA and OST Management Team to Develop Requirements

Senior BIA and OST managers and representatives of BIA's trust resource operations, the Department CIO, BLM, MMS and servicing procurement officials outlined and documented, at a high level, the TAAMS functional requirements. The product was handed off to a technical group of information technology specialists and trust resource managers. *This task was completed on schedule by April 24, 1998.*

D. Prepare and Publish Request for Information (RFI) for COTS Systems

Working with the servicing procurement office, the joint BIA/OST team and the systems consultant prepared and published a formal RFI for applicable commercial off-the-shelf applications thought to meet the functional requirements defined in preceding tasks. *This task was completed on schedule June 19, 1998.*

E. Organize Joint Technical Team to Develop Functional Requirements and RFI

A technical team elaborated on and refined the high-level requirement definition, evaluated commercial off-the-shelf applications, prepared a preliminary systems design, developed acquisition documentation, and obtained Departmental approval for proceeding with a procurement action.

The team interviewed a number of potential contractors, exchanging information regarding the BIA's specific information needs, logistical requirements for deployment, organizational issues and resource constraints.

Two vendors submitted final bids which were evaluated according to a pre-determined contract ranking system. *This task was completed in September, 1998.*

F. Obtain DOI Approval for the System and Approach

The joint BIA/OST staff prepared and submitted to the Department a Technology Investment Analysis (TIA) to justify the proposed TAAMS system and acquisition approach. *The Department approved the TIA on September 11, 1998.*

G. Develop Procurement Documents Using Joint BIA/OST Technical Team and Systems Consultant

Using the results of internal research, review of existing automated national and local systems within BIA, and feedback from the RFI, the joint BIA/OST team and the system consultant prepared the necessary procurement documents and supplemental justification for the TAAMS system acquisition. *This task was completed August 27, 1998.*

H. Select TAAMS Project Management Team

A BIA project manager was selected and a project team structure and project management approach was developed. Team composition included program experts from BIA and OST and information technology specialists from consulting firms. *This task was completed on schedule November 30, 1998.*

I. Award Contract to Successful Bidder

BIA awarded a contract to the successful bidder based on pre-defined criteria by a source selection board consisting of BIA, OST and Departmental staff. *The BIA issued a performance-based contract to the successful offerer on December 2, 1998.*

J. Develop System Modification Strategy with Contractor

The BIA project management team worked with the selected TAAMS provider to develop a comprehensive system modification strategy. BIA system users met regularly in pre-defined functional teams with the software vendor in order to further define and outline user needs and requirements. Users participated in the actual design of the graphical user interface. As implemented, TAAMS is best described as a modified off-the-shelf system (MOTS).

Using the legacy data from the Rocky Mountain Region, the teams mapped data needed to populate the selected trust asset management application and developed automated routines for data conversion.

The actual system modification was conducted between January 1999 and May 1999. The TAAMS prototype was unveiled on schedule in June 1999 in the Rocky Mountain Regional Office in Billings.

K. Complete System Modification Effort

The BIA is working with the software vendor to modify the off-the-shelf product through

an iterative process of developing system prototypes. Each prototype is reviewed by the user and further revisions are made until the prototype is accurate and reflects business needs.

The software vendor and the BIA collaborated on a series of test scripts that could be used during system testing. The actual script was developed by a third-party contractor. As the TAAMS software evolved, the script underwent continual change. The scripts can continue to be used for future regression testing of TAAMS.

The initial system modification effort includes all development requirements of TAAMS, including developing the interfaces with TFAS and MMS, mandatory reports, and all contract functional requirements that were determined to be mandatory in the original contract (as amended by contract modifications that were necessary to reflect the dynamic system development that has been undertaken by the Department). As the initiative progressed, it became apparent through direct discussion with the user that certain TAAMS features could be deferred and others would need to be accelerated. Contract modification was necessary to ensure that the required core functionality was properly identified in contract form.

Because TAAMS provides functionality to different BIA realty operations, it is consistent with information technology "best practices" to consider deployment of TAAMS on a functional basis as opposed to waiting for the entire system to be completed. As such, the BIA plans to deploy TAAMS to its title plants while continuing to test and solidify all aspects of the leasing modules, including the interface between TAAMS, TFAS and MMS.

The Title portion of TAAMS is scheduled for completion May 2000. The mandatory realty functions, including the necessary interfaces with MMS and TFAS to process distribution transactions, are scheduled for completion in August 2000.

L. Analyze the National Requirement for End User Work Stations and Distribute Necessary Hardware to Rocky Mountain Region as needed

The original HLIP stated that the Department would acquire approximately 2,000 new workstations for TAAMS users (one-half new purchases and one-half upgrades). As the desktop requirements of the TAAMS software solidified, it became obvious that TAAMS, coupled with other new software packages used by the Department such as Lotus Notes, could not effectively be run on the existing equipment.

As such, more new PCs than originally planned for will be required. To date, the replacements have come from the Department's Y2K PC replacement effort. A large number of PCs have been purchased for the BIA and tribes and they will ease the transition to TAAMS. As the software is deployed, across the country, continual re-evaluation of PC needs will be required to ensure that the proper hardware is available.

M. Conduct System Testing

The software vendor will perform unit integration and system testing of the system after it is unveiled at the pilot site in Billings. The BIA will provide a user team to work with the vendor to ensure that the system is operating properly and that it meets the BIA's business needs. The users will use a system test procedure consisting of detailed test scripts which will test all aspects of the system. Final system testing will be conducted by the software vendor. *Testing was conducted the weeks of September 27 and November 22, 1999.*

N. Complete Training of Support and User Personnel at Pilot Site and for remaining BIA and Tribal Personnel

Training on the new Trust Asset and Accounting Management System in Billings is expected to include both BIA and OST users and designated support personnel. The training is provided by the software vendor..

Subsequent TAAMS training will be provided by a team of trainers consisting of the software vendor and BIA program experts and will be conducted in a central training facility.

Training will be conducted based on the functional need of the staff and will vary in length from one day to one full week. Training effectiveness will be evaluated and retraining for staff will be conducted as necessary. New user training will be scheduled during conversion at other sites.

User training is scheduled for completion approximately 7 to 45 days prior to implementation of the new Trust Asset and Accounting Management System at each Region to ensure better user retention of the training information and skills.

Approximately 50 training sessions will be conducted for BIA and tribal staff over the next year and one-half. The provider will be tasked with staffing an extensive help desk operation to aid in the conversion and training effort.

Since the initiation of the training effort, it has become apparent that TAAMS requires a more intensive level of user training than previously estimated. TAAMS differs significantly from the legacy systems it is replacing and users need to acquire a completely different approach to data entry. Furthermore, there are business changes which are occurring along with system implementation that must also be addressed during training. *Training sessions for the Rocky Mountain Region staff were completed in early June 1999. Training for new users was conducted again in September 1999 and repeated in November 1999. Retraining will continue in Billings until a satisfactory level of user familiarity with TAAMS is demonstrated.*

O. Complete Independent Verification and Validation of TAAMS

An Independent Verification and Validation (IV&V) contractor, SRA, International, was hired in May 1999 to provide the Department with an independent review of the TAAMS application. The Department's purpose was to independently assess the TAAMS system for compliance with the contract's functional requirements, provide feedback on the overall usability of the application by BIA end users, and assess the BIA's preparation for deployment.

From June through November 1999, the IV&V team observed various system and functional tests of TAAMS, culminating in the final system test on November 22-24. Based on industry standards and their own testing experiences, the IV&V contractor provided suggestions the TAAMS team was able to incorporate, improving the test results and ensuring the tests were repeatable. From February 1-4, 2000, the IV&V contractor staff also attended the User Test at the Rocky Mountain Regional Office (in Billings, MT) as observers. This provided the IV&V team feedback on the BIA end users' reaction to the TAAMS application and how the system works in the field.

In their report, the IV&V team made the following recommendations. They stated the TAAMS test plan was adequate and the TAAMS team could improve the plan further by adding details on the technical tests (i.e., Performance, Year 2000, and Disaster Recovery test areas). The majority of the test scripts for testing the functional requirements were also adequate and contained enough detail for repeating the test. However, some of the scripts would require additional modification to test the critical functions not totally validated (partially tested, not tested, or failed validation) by the IV&V team. They recommended the software vendor maintain these scripts for use in regression testing of current changes and any future software releases. Testing of one critical area - the TFAS and MMS interfaces - remained incomplete and the IV&V contractor recommended against full deployment of TAAMS until that functional area was fully tested.

SRA further recommended that comprehensive testing be performed periodically during the deployment phase to ensure full system performance can be maintained under load and the network has sufficient capacity. As a result, periodic load testing will enable the TAAMS project team to detect any performance degradation early enough to provide a timely resolution, if needed.

User feedback indicates the BIA users are eager to begin using TAAMS and the Billings staff are sufficiently trained. SRA also recommended assessing the users' needs prior to deploying to each new area. They also recommended that the Department solidify its business rules concerning trust operations and incorporate them into TAAMS.

The IV&V team concluded their report with the following: "Assuming the foregoing recommendations and risk mitigation strategies are implemented, the IV&V team [SRA] feels that deployment beyond the Rocky Mountain Region could proceed with minimized risk and a reasonable assurance of success."

P. Initiate TAAMS Pilot at BIA's Rocky Mountain Region Office

The TAAMS prototype was unveiled at the BIA's Rocky Mountain Region Office in order to give the public and the BIA staff an opportunity to undergo initial training and exposure to the system. Immediately following the unveiling, an extensive set of testing procedures and user reviews was conducted to insure that TAAMS met the contract requirements and user needs. *Unveiling of TAAMS was completed on June 25, 1999 at the Rocky Mountain Regional Office.*

Q. Perform User Testing at Pilot Site to Determine Adequacy of TAAMS Under "Live" Conditions

The performance of TAAMS at the Rocky Mountain Region pilot test site is being evaluated against pre-established requirements specified in the contract to objectively measure the success of the new TAAMS.

All Billings region agencies are included in the pilot. Both pilot and parallel processing will continue until the user community feels comfortable with TAAMS and a decision is made to discontinue data entry into the legacy systems.

A user test was conducted in the Billings Regional Office the week of February 1 - 4, 2000. Simultaneously, testing was conducted at the Crow Agency and realty staff from four additional agency offices participated in the user test at the Billings site. A significant number of transactions were entered into both TAAMS and the legacy systems in order to ensure that TAAMS was providing accurate results. In addition, a usability questionnaire was administered to the participants.

Transactions for both the leasing and title function were entered into TAAMS, with the heaviest concentration focusing on title. The test did not include a full test of the accounting and distribution capabilities of TAAMS because it had already been decided to focus on title processing. A similar user test will be conducted at a later date which fully addresses the leasing, accounting, distribution and interface functions.

Initial results from the User Test were positive and illustrated a high level of acceptability of TAAMS by BIA users. The transaction analysis indicated no major problems and demonstrated that the core functionality for TAAMS existed in release Version 1.0.

The TAAMS project management team has scheduled a meeting in early March with the BIA, OST and MMS, along with all respective software vendors to discuss any remaining interface issues. It is anticipated that the remaining concerns will be few and can be addressed without any major delay.

R. Deployment Decision Review

The BIA completed its official assessment of the title functions of TAAMS in terms of system functionality and usability in February 2000. That assessment will be forwarded to the Department for a final deployment decision for roll-out to BIA title plants as the first stage in the total TAAMS roll-out. *The initial deployment decision for the LTROs is expected to be made in March 2000. A follow-up decision will be required when distribution and interface capabilities are in place and adequately tested. The time for this is to be decided.*

S. Deployment to BIA and Tribal Sites

Deployment begins with the loading of TAAMS software on the desktops of the individual workstations at the office site. For project management tracking, the "deployment date" reflects the above action. Upon loading of software, an extensive set of data reports will be provided to the office to review the converted data resident in TAAMS. These reports will form the basis for the initial activities conducted under deployment data cleanup.

The realty personnel at the deployment site will be required to carefully review the data reports and, with DataCom Sciences, Inc., make a determination regarding the completeness and quality of the converted data. The determination will include an estimated period of time in which the office will become familiar with TAAMS, initiate any immediate corrections to the database necessary to ensure that processing can be accomplished, adjust local work flows, and ensure that the local network and telecommunication infrastructure is properly functioning. The TAAMS project management team will also be involved in this determination.

Once the tasks are satisfactorily completed and the office is using the TAAMS software full-time, the site will be considered "implemented". This period may be as short as two-weeks or as long as 120 days depending on the issues that must be addressed at that individual site.

Deployment will be conducted in two phases. First, all Land Title and Records Offices will be deployed. Once TAAMS is fully operational in all LTROs, deployment to BIA and tribal offices conducting the realty function will begin.

Deployment planning for both title and realty functions includes a readiness review at each deployment site including the following criteria:

- Data cleanup status
- Hardware delivery
- Communications availability
- Security requirements fulfilled
- Training conducted
- Management involvement

For the LTROs, deployment will be conducted on an office-by-office basis until all eight offices are complete. The Title deployment will also include three tribal sites that have contracted to perform title functions.

At present, it is estimated that all sites performing the title function will be deployed between May and December, 2000. Realty sites will be deployed beginning in August 2000 at BIA Offices and continuing through

to Tribal sites.

The Realty deployment schedule will generally follow a geographic process, although a specific sequence has not yet been determined. Various options exist including a regional geographic deployment schedule as originally discussed in this Plan or deployment in "groups of offices" irrespective of geography.

As stated above, the actual sequence is based on site readiness, including completion of pre-implementation data cleanup. Once the Department makes a final decision regarding deployment, a more precise schedule will be developed subject to modification based on site readiness.

Because system deployment is dependent on the completion of cleanup activities at each site, it is not possible to *project a complete deployment schedule* at this time. Therefore, the BIA will review data cleanup progress quarterly at each potential deployment site and initiate detailed deployment planning at only those sites that can reasonably be deployed in the following six months.

T. Complete TAAMS Deferred Modifications

The TAAMS contract for software services identified a number of functions for TAAMS which were classified as mandatory-deferred. These functions were determined to be important but not required in TAAMS Version 1.0. Upon a deployment decision by the Department, indicating that TAAMS Version 1.0 is acceptable, BIA design teams will initiate a thorough development of design specifications for these contract requirements to provide to the software vendor to support the modification of TAAMS to include the following additional functionality.

- Estate Administration
- Miscellaneous Conveyance features
- Miscellaneous recording features
- Lease closeout features

These functions are scheduled to be part of a planned release of TAAMS by September 30, 2000. The Department will evaluate the need and delivery of these requirements in June 2000 in order to ensure that initiating work on these features is still consistent with the design of TAAMS and would not interfere with the on-going system modification effort at that time. If it is necessary to postpone, revise or amend the TAAMS contract in any manner, it will be officially modified after that analysis.

Additionally, there may be other system enhancements, not found in the original TAAMS contract, which will be included in TAAMS Version 2.0. Included may be appraisal, enhanced probate and, possibly, a geographic information system.

U. TAAMS Documentation and Supporting Information

A significant level of corresponding documentation is being developed to support TAAMS, including an expanded data encyclopedia, user entry reference guidance, user manuals, system

architecture, etc.

Documentation is completed as appropriate to the initiative. This will be reviewed and incorporated as appropriate in the Department's Trust Business and Computer System Architecture Framework.

V. TAAMS Ongoing Operations

The TAAMS initiative includes ongoing operations through the contractor's service bureau. As such, the TAAMS contract calls for a number of performance requirements through the life of the contract. These requirements will be regularly reviewed by the BIA to ensure that the contractor is meeting all contractual requirements.

Examples of these performance requirements include:

- System speed and performance
- Disaster recovery services
- System backup
- System configuration management
- Application maintenance services
- Auditing and system monitoring
- Operations security

This task is ongoing, with various reviews conducted on both a quarterly and annual schedule by an outside and objective third-party technical expert. Those elements will also be reviewed in the Department's Trust Business and Computer System Architecture Framework effort.

Exhibit 8

HLIP Mtg 02/22/00

① John S – set w/ Jerry @ SCA to find "acceptable" words for HLIP

② Coord w/ Tom + Dianne S to set on Joel K's calendar.

SCA
GAO
PM
} TAAMS status

Status of final IV+V report due 2/23/00
Who will get copies?

- GAO?
- OST, BIA, PMB ← John B, John T / Jeanie, Bob L / Penelope, Paul D / Nyce
- SOL

BIA Probate —

TAAMS — Tommy's version

BIA Data Cleanup / Mgt —

TZ

"much improved"

"perhaps too much candor"

Edith — some clean shift to 1/4/y report

Exhibit 9

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	:	Civil Action 96-1285
Plaintiffs,	:	
v.	:	Washington, D.C.
	:	Tuesday, April 4, 2000
BRUCE BABBITT, Secretary of the Interior, et al.,	:	10:42 a.m.
Defendants.	:	

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE ROYCE C. LAMBERTH
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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Pages 1 through 15

Theresa M. Sorensen, CVR-CM, Official Court Reporter

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PROCEEDINGS

THE DEPUTY CLERK: In the matter of Elouise Cobell, et al., versus Bruce Babbitt, et al., Civil Action 96-1285. Mr. Gingold, Mr. Harper, Ms. Babby, Mr. Levitas, Mr. Holt and Mr. Brown for the plaintiffs. Mr. Findlay, Mr. Ferrell, Mr. Brooks, Ms. Lundgren and Ms. Himmelhoch for defendants.

THE COURT: All right, this matter comes before the Court on the plaintiff's motion for preliminary injunction to enjoin the defendants from allowing government contractors to be given access to confidential trust information relating to the individual Indian money trust accounts, and an electronic data system located in the Bureau of Indian Affairs Office of Information Resource Management, being moving from Albuquerque, New Mexico, to Reston, Virginia. Because of the government's requirement for urgent disposition of this motion and their cross motion to dissolve the temporary restraining order, and the need to rule before the extended temporary restraining order expires today, I have determined that I will issue this oral ruling because of inadequate time to prepare written findings and conclusions.

The plaintiff class, as beneficiaries of the trust accounts, are rightly concerned with the proper preservation of this important trust data, and they argue that contractor access to this data violates various laws and endangers the data itself.

Before turning to the specific issues presented by the plaintiffs' motion, I have some general observations about what the Court has discovered since I issued my ruling on the Phrase One trial last December.

I'll break this into six areas: First, the summary of the defense, that trust reform is underway; second, architecture; third, implementation schedule; fourth, independent verification and validation; fifth, interface, and; sixth, functionality.

As to the summary of the defense, the representations at trial and the closing argument was, as follows,at trial transcript at page 5011. Quote, "What I think our proof has shown you, however, is that trust reform is springing up. Not overnight, Your Honor, but steadily and with growing momentum. There seems to be little or no disagreement that what the Interior Department is doing today is implementing a set of necessary and appropriate measures to bring the trust reform system forward, and to help bring it into compliance with the standards laid out in the Trust Reform Act of 1994."

Also in the argument at page 5033 was this statement: "The rest of it has been presented, but perhaps not as clearly as it should have been. Policies and procedures exist in this BIAM, the BIA manual. They exist in the Department manual. They exist by force of law as

regulations. There's an awful there."

What the Court has now discovered, however, as exemplified by paragraph 7 of the March 7th, 2000, declaration of Daniel Marshall, III, Executive Vice President of the government contractor involved here, ISI, he says, quote, "I have observed that systems applications fail on a daily basis. ISSDA reports to the Treasury Department have not worked since at least January. There currently exists no published standards or procedures. Metrics are lacking for measuring application code changes, requirements documentation, data center run times or recovery help calls received. There exists no run books for the data center, and to my knowledge, Unisys software has not been updated since installation two years ago. Most importantly, there exist no written operating procedures or security manuals in the current work environment. ISI has been tasked to remedy these deficiencies during and after the relocation of OIRM from Albuquerque, New Mexico to Reston, Virginia.

The other point, I'll cite paragraph 18 of Dominic Nessi's March 20, 2000, declaration in which he notes that at some point after January 2000, the contractors were tasked with relocating the office of OIRM, "and they discovered, quote, "that there was little or no documentation on the operation of any OIRM managed system, or at least none was made available to the contractor," unquote.

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Mr. Nessi acknowledged that he was surprised by the revelation. Mr. Nessi also admitted that he was unaware of this dangerous lack of system and documentation in OIRM until he learned this from the contractor.

The second area I want to discuss is architecture. At trial, Mr. Nessi testified at page 2572 that defendants have considered and are working on an architectures. They have conducted in depth discussions with OTFM and MMS to ensure that they understand the relationships between the systems, and he also said at page 2582 they will start documenting that in a more formalized way. He also testified that commercial off-the-shelf systems, COTS, like TAAMS, are frequently designed this way.

In the closing arguments at page 5030, the government argued the testimony was pretty clear from Mr. Thompson and Mr. Nessi, that with the COTS commercial off-the-shelf software, architecture isn't such a big issue.

The Court now learns that the reality is that in the HLIP 2000, at page 69, the original plan for TAAMS deployment has undergone considerable change since trial, and TAAMS is now described at page 76 of that plan as a modified off-the-shelf system.

At page 69 of that plan, defendants have now recognized that a significant level of analysis and system modification remains before TAAMS will meet BIA's core

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business needs.

Also at page 69 the quote, "As a result of a limited amount of preplanning and development," defendants are now employing a new system development methodology that allows for numerous system releases.

Although frequent releases have made system testing difficult, features included in new releases must be constantly reviewed "to ensure that they [do] not conflict with some aspect of TAAMS previously decided upon." That's also at page 69.

At page 70, it's noted that, "Through training exercises, it's been repeatedly revealed that the latest system release [does] not meet the user's needs, and also that business rules continue to need refinement."

Looking then at implementation schedule, the testimony at trial by Mr. Nessi, at page 2576, was that "TAAMS has a realistic project management schedule."

The testimony of Assistant Secretary Gover, at page 1138, was; "There is an excellent project management schedule for TAAMS."

The Court now learns in HLIP-2000, at page 71, that, "In retrospect, the Department concedes that the plan was overly optimistic given the complexity of the task." At a the same page the Department says, "The deployment schedule originally outlined in the TAAMS contract [cannot] be

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achieved as originally planned."

At pages 81 to 82 in the HLIP-2000, it notes that because the accounting, distribution and interface capabilities of TAAMS are not yet in place and cannot yet be tested, "it is not even possible to project a complete deployment schedule at this time."

Turning then to independent verification and validation. Mr. Nessi's testimony at trial, at page 2385, was making sure that a system operates properly, i.e., independent verification and validation, "is the heart of a system development effort."

The Court now learns that the reality, as set forth in HLIP-2000 at page 70 is, the modified system development effort "does not lend itself to system testing in the traditional sense," and "Conversion issues...oftentimes interfere[] with a full test."

And then in HLIP-2000 at page 79, testing "of one critical area, the TFAS and the MMS interfaces, remains incomplete, and the independent verification and validation contractor [has] recommended against full deployment of TAAMS until that functional area is fully tested."

Turning then to the interface issues, at trial the TAAMS/TFAS interface was described by Mr. Thompson's testimony as, "Not a very complicated technical thing to have to do at this time. It's kind of like merging two software

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packages on your personal computer." That's at trial transcript at 3096.

Mr. Nessi's testimony at trial was, the programming of the TAAMS and TFAS interface was complete as of July 1999.

Mr. Orr's testimony at trial was that as of July 1999 interfaces between TAAMS and TFAS were "already built." That's at page 74.

Mr. Nessi's testimony at page 2586 is, "If the interface didn't work tomorrow, it would probably take 12 hours to get the interface working."

The Court now learns the reality, according to the HLIP-2000 at page 71, quote, "In retrospect, the plan to purchase two off-the-shelf systems independently, TAAMS and TFAS, and interface them with an existing system, MMS, had inherent difficulties from its inception."

And then in the Quarterly Report Number 1 at page 13, quote, "Interfaces between TAAMS, TFAS and MMS, are not yet complete."

Turning to functionality. At trial the Court was told by Nessi's testimony, at page 2391, that on June 28th, 1999, the TAAMS project manager "honestly [could not] think of a flaw in the system...It's that good."

Mr. Nessi said at page 2578 to 2579, TAAMS is operational. "The system is already working," and at page 2668, "TAAMS will be 20 times better than the legacy systems

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by the fall of 1999."

The testimony the Court has now learned is, in the Thompson deposition transcript, at page 102, "TAAMS is not up. They're still working a pilot in the Billings area. It is not operational."

And in the Rossman deposition, most surprising of all to the Court, at page 173, TAAMS contains test data only, "not the actual file data."

The Rossman deposition, at pages 124 and 174, also indicates that because TAAMS is not yet operational, the designation of IRMS and LIRS as legacy systems is premature. "They are not legacy yet."

Turning now to the office and data move from Albuquerque to Reston, I granted a temporary restraining order on March 7th. At defendant's request, I modified that temporary restraining order on March 16th to make clear that it only applied to contractors in connection with the move of the OIRM function of BIA. In order to allow full briefing, I extended the TRO until today. I now grant the government's motion to dissolve the TRO, and I deny the plaintiff's motion for a preliminary injunction.

I do this because I have concluded, albeit reluctantly, that as of today plaintiffs are unable to establish a sufficient likelihood of success on the merits to warrant granting the extraordinary remedy of granting a

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preliminary injunction.

It's clear that the defendants were, in fact, acting in violation of the law on March 7th, when this Court granted the temporary restraining order. But as of today, the government appears to have brought itself into compliance by assuring that both the contractor for the move, Interior Systems, Incorporated, and its contractual partner, PRT Group, Incorporated, are legally obligated to keep all trust data confidential. The contract and subcontract now have specific privacy act confidentiality clauses, and the contractual relationships appear to be authorized by law for purposes s of the Trade Secrets Act. Although the question is not free from doubt, for purposes of today's ruling, the Court finds as a preliminary matter that the confidentiality provisions imposed on the contractors are sufficient to insure against violation of the Indian Minerals Development Act, assuming that the Interior Department is entitled to some deference under Chevron in it's interpretation of that particular statute.

The Court continues to be alarmed and disturbed by the revelation that BIA had no security plan for the preservation of this data before this TRO was brought, and that BIA has now placed itself in the incredible position that it cannot now create such a plan with its own employees, but that it can do so only if this Court allows BIA to go

Page 12

forward with these government contractors creating the plan, and then insuring that this critical data is preserved and protected.

This entire fiasco is vivid proof to this Court that Secretary Babbitt and Assistant Secretary Gover have still failed to make the kind of efforts that are going to be required to ever make trust reform a reality. Coming so soon after their trial testimony last summer, and all of the personal assurances they gave this Court about the priority they were now placing on trust reform, the facts brought to light in this proceeding provide overwhelming proof to the Court that the defendants simply continue to provide more empty promises.

Nevertheless, the Court cannot enjoin this operation at this time without inflicting substantial harm on third parties and, indeed, without harming the very beneficiaries of these trust records who will have critical payments delayed by the disruption of operations that would occur if the preliminary injunction issued.

The defendants argued to this Court that the risk of data loss increases with every day that the Court denies access to these government contractors, and I find this is, in fact, true. The sheer incompetence of BIA and the way they undertook these moves can now only be saved by their own contractors. The defendants admit that they will still not

Page 13

be in compliance with OMB circular A-130, requiring a security plan, but they say that only the contractors can now prepare such a plan so that they can come into compliance.

At page 16 of their opposition memorandum, the defendants admit that have still been unable to develop a critical plan for concept of operations.

Plaintiffs complain that contractor access has been allowed despite the Court's restraining order. The Court does not resolve that question today. The evidence is conflicting, and in the absence of a motion to hold defendants in contempt of Court, the Court is not required at this point to resolve the conflict.

I advise the defendants that they might forestall such a contempt motion by the plaintiffs if they provide step-by step information as this move goes forward about how the security of the data is being preserved. Since the defendants admitted in their opposition memorandum filed on March 21st that there was no written contact between ISI and PRT until March 21st, there was a clear violation of the Privacy Act if any access to such data was allowed to PRT or its employees prior to March 21st.

So for defendants to argue that plaintiffs' request for a temporary restraining order and preliminary injunction, quote, "Do not serve to secure the confidentiality or security of the individual Indian trust data," is simply and

blatantly false. Without the action that the plaintiffs took, this move was slated to take place without a security plan, and in violation of at least the Privacy Act, and probably other statutes as well.

I will say again what I've said before, the 300,000 Indian plaintiffs deserve better than they're getting from the Department of Interior and the Bureau of Indian Affairs in this case.

Since we're in baseball season starting yesterday, I will say in baseball terms that hopefully the defendants can understand, the Court considers this to be strike one since the Court's December ruling. Even though the plaintiffs are not going to receive the preliminary injunction they seek today, they have again achieved another important victory in their effort to establish the defendants are either unable or unwilling to take the steps necessary to make trust reform a reality.

I'll issue a written order to that effect. The Court will be in recess.

(Whereupon, the proceedings in the above-entitled matter were adjourned at 11:02 a.m.)

CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Theresa M. Sorensen, CVR-CM
Official Court Reporter

Exhibit 10

Certification Memorandum

To: OST Administrative Record
MS 5141, MIB
Facsimile 202-208-7545

From: Terrance L. Virden, Subproject Manager
HLIP/Breach Project - BIA Data Cleanup

Subject: Statement Regarding Status of Project Reported in Seventh Quarterly Report
Cobell v. Norton, Civil Action No. 96-1285

I am the Subproject Manager of the above referenced project.

I have attached a narrative to be added to the "Data Cleanup Overview By Region" section that clarifies a statement that was criticized by the Court Monitor in the final draft. Although the statement that he highlighted was not provided by me originally, I feel it is necessary to replace it with the attached text. I want to make it clear that we are not withholding information from the court. I have also added several other changes that will clarify information that I have provided.

I have asked those persons who provided information to me for compilation in this Report whether the information is believed to be factual and relevant. Based upon the reasonable assurances I received in response to this inquiry, and to the best of my knowledge, information, and belief, this Report reasonably represents the current status of the tasks for which I am responsible.

Terrance L. Virden

Terrance L. Virden, Subproject Manager
HLIP/Breach Project - BIA Data Cleanup

Date: September 26, 2001

EXHIBIT 8
TO THE NOTICE OF FILING OF INTERIOR'S SEVENTH QUARTERLY REPORT AND RELATED PAPERS

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of November, 2001, I served a copy of the foregoing 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 upon the following via the means indicated:

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