IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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| ELOUISE PEPION COBELL, et al., | ) | |
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| Plaintiffs, | ) | |
| | ) | |
| v. | ) | Case No. 1:96CV01285 |
| | ) | (Judge Lamberth) |
| GALE A. NORTON, Secretary of the Interior, et al., | ) | |
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| Defendants. | ) | |
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**DEPARTMENT OF THE INTERIOR'S RESPONSE**
**TO THE FIFTH REPORT OF THE COURT MONITOR**

The Secretary of the Interior and the Assistant Secretary - Indian Affairs ("Interior Defendants" or "Interior") submit this response to the Fifth Report of the Court Monitor ("Fifth Report"), filed February 1, 2002. The Fifth Report addresses the Court Monitor's monitoring and review of the progress of the Department of the Interior ("Interior") Office of Historical Trust Accounting ("OHTA") "in complying with this Court's December 21, 1999 order to provide the [P]laintiffs, IIM account holders, with an historical accounting of the Individual Indian Money (IIM) trust accounts." Fifth Report at 1.

In the Fifth Report, the Court Monitor states that "OHTA has made more progress in [the historical accounting] effort in six months than the past administration did in six years." Id. at 18. Nonetheless, the Court Monitor believes that the Interior Defendants are still not in compliance with this Court's December 21, 1999 ruling regarding the historical accounting, id. at 16-17, and recommends that the Court rule on Defendants' pending motions for summary judgment and "set a briefing schedule in which the parties can further address any other issues

that they may wish to place before this Court on their interpretations of its December 21, 1999 historical accounting declaratory judgment," id. at 17.

Interior agrees with the Court Monitor's finding that OHTA has made progress in developing historical accountings for IIM account holders. However, Interior disagrees with the premise of the Fifth Report that "no historical accounting process . . . can be properly begun" unless the Court rules on the pending summary judgment motions and on any other legal limitations on the scope of the historical accounting. Id. at 18. In fact, a significant amount of accounting work can be – and is being – accomplished without implicating any "scope of the historical accounting" issues. For example, as explained below, Interior is in the final stages of preparing the accountings that will be provided to approximately 8,000 Judgment account holders with IIM balances totaling approximately $30 million (at September 30, 2001), and expects these accountings to provide the basis for the Court's first review of Interior's accounting work.

Interior respectfully suggests that the Court Monitor may misapprehend the nature of the "temporal scope" issues that remain unresolved. The Court Monitor assumes that open questions about the scope of the historical accountings imply that Interior or its attorneys intend to somehow limit or disregard this Court's declaratory judgment that "[t]he Indian Trust Fund Management Reform Act ("1994 Act"), 25 U.S.C. § 162a et seq. & 4011 et seq., requires [D]efendants to provide [P]laintiffs an accurate accounting of all money in the IIM trust held in trust for the benefit of [P]laintiffs, without regard to when the funds were deposited." Cobell v. Babbitt, 91 F. Supp. 2d 1, 58 (D.D.C. 1991). As explained below, Interior and its attorneys have

no such intent and agree that this Court and the Court of Appeals have, in broad terms, defined the temporal scope of the historical accounting project.

Interior is concerned that the Court Monitor may underestimate the complexity and magnitude of the historical accounting project and the numerous factors that will affect singly or in various combinations the accounting required for a particular IIM account holder (or homogeneous group of account holders). Some of these factors, including but not limited to relevant statute of limitations, the date an account was opened, the effect of probate proceedings for the estate of a predecessor, and judgments or settlements of previous claims may affect the "temporal scope" of the accounting due a particular individual. Determining the "start date" for an individual accounting must take into consideration all of these factors (and perhaps others not yet identified) and do so in compliance with the rulings of this Court and the Court of Appeals. This complexity will likely prohibit the development of a single, uniform methodology and across-the-board determinations regarding the scope of the accountings. Accordingly, Interior is developing methodologies and performing accountings for relatively uncomplicated accounts and transactions first, and intends to use the knowledge gained in the early accountings, as well as the substantial body of knowledge already gained as discussed below, to develop methodologies and perform accountings for increasingly complex accounts and transactions. With this approach, work can progress as increasingly challenging accountings are developed, and decisions regarding the "scope" of a particular accounting or group of accountings can be informed by development of the relevant factual predicates.

As explained below, these issues cannot, consistent with this Court's jurisdiction under the Administrative Procedure Act, 5 U.S.C. §§ 701-706, be reviewed in the absence of a final

agency decision and should not, in any event, be decided in the abstract without a developed factual context. Accordingly, Interior respectfully submits that the Court Monitor's recommendations that the Court rule on Interior's pending summary judgment motions,[1] set a briefing schedule to address other issues, set a trial date, and decide "what will be expected as proof of the historical accounting," Fifth Report at 17 n.8, are inconsistent with the nature of this action.

**A. OHTA Is Making Diligent Progress On The Historical Accounting.**

Interior respectfully takes issue with the Court Monitor's conclusion that it is "[s]till [n]ot [i]n [c]ompliance [w]ith [t]his Court's December 21, 1999 [r]uling [r]egarding [t]he [h]istorical [a]ccounting."[2] Fifth Report at 16. OHTA is making diligent progress; indeed, it is in the final stages of preparing the accountings that will be provided to approximately 8,000 IIM account holders.

On December 21, 1999, this Court entered a declaratory judgment that "[t]he Indian Trust Fund Management Reform Act, 25 U.S.C. §§ 162a et seq. & 4011 et seq., requires defendants to provide [P]laintiffs an accurate accounting of all money in the IIM trust held in trust for the benefit of [P]laintiffs, without regard to when the funds were deposited." Cobell v. Babbitt, 91 F. Supp. 2d 1, 58 (D.D.C. 1999). The United States Court of Appeals for the District of

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[1] Defendants filed a motion to withdraw these pending summary judgment motions on the same day the Fifth Report was filed.

[2] Obviously, if the Court Monitor believes being "in compliance" with this Court's December 21, 1999 ruling means *completing* the historical accounting project, compliance will take considerable time.

Columbia Circuit described this duty slightly differently in accordance with the language of the statute:

> . . . Section 102 of the 1994 Act makes clear that the Interior Secretary owes IIM trust beneficiaries an accounting for "*all* funds held in trust by the United States for the benefit of an Indian tribe or an individual Indian which are deposited or invested pursuant to the Act of June 24, 1938." 25 U.S.C. § 4011(a) (emphasis added [by Court of Appeals]). "All funds" means *all funds*, irrespective of when they were deposited (or at least so long as they were deposited after the Act of June 24, 1938).

Cobell v. Norton, 240 F.3d 1081, 1102 (D.C. Cir. 2001).

The Secretary of the Interior ("Secretary") has agreed with this Court and the Court of Appeals that an accounting to the IIM beneficiaries is long overdue, and, as explained in the response to the First Report of the Court Monitor, understands that there is no easy shortcut to the development and implementation of a satisfactory accounting, which undeniably will take considerable time at substantial expense. On July 10, 2001, the Secretary issued Secretarial Order No. 3231, which created OHTA and charged it specifically with planning, organizing, directing, and executing that historical accounting.

Although the Court Monitor observes that OHTA has "made more progress in [the historical accounting] effort in six months than the past administration did in six years," Fifth Report at 18, he makes little mention of the historical accounting work that is underway. In a section entitled "The Eighth Quarterly Report," the Court Monitor simply reports that "[t]he OHTA staff provided the Court Monitor an update on the prototype projects and the status of consultant retention" and "[t]hey believed that they would be able to meet their self-imposed midyear suspense date for preparation and filing of the Comprehensive Plan." Fifth Report at 15.

In the Analysis section, the Court Monitor states that "[t]he prototype projects that are being touted as the start of the accounting, and will allegedly address much of the monies in the IIM Trust, are in their infancy." Id. In the Remarks section, the Court Monitor states that the historical accounting process "is not much further along than the [P]laintiffs' description of it as a 'plan for a plan.'" Id. at 18. Interior respectfully suggests that this does not sufficiently describe the significant work taking place on the historical accounting.

As reported in Interior's Status Report to the Court Number Eight ("Interior's Eighth Report"), the work identified in Interior's Report Identifying Preliminary Work for the Historical Accounting is well underway. Chevarria, Dunne & Lamey ("CD&L"), a certified public accounting firm under contract with Interior, has completed a pilot project in which it examined IIM accounts and transactions affected by the ten largest tribal judgment awards. This work has resulted in the reconciliation of approximately 8,000 IIM accounts with an aggregate balance (as of September 30, 2001) of approximately $30 million, which represents nearly 8% of the IIM trust fund balance. See Interior's Eighth Report at 23-24. Reconciliation of these accounts did not implicate any "temporal scope" issues because the activity in the accounts related to the judgment awards. OHTA has hired a second certified public accounting firm, Grant Thornton LLP, to conduct a quality review of the accounting work for these Judgment accounts. When the quality review is complete, and Interior and its advisors have reviewed the results, Interior expects to send accounting statements to approximately 8,000 IIM account holders.

The historical accounting for Per Capita accounts is also ongoing. Per capita payments may result when tribal revenues (from, for example, natural resources) are distributed to tribe members. See id. at 24. Analysis of the five largest per capita distributions has resulted in the

reconciliation of 23,200 transactions totaling $51.6 million which will contribute to the reconciliation of 17,400 IIM accounts. Id. at 24.

Contractors and consultants are now in place to undertake the historical accounting for the Agua Caliente Indians served by the Palm Springs Field Office of the Bureau of Indian Affairs ("BIA") as well as for the active IIM accounts in the BIA's Eastern Region. Id. at 25-26. In addition, OHTA has engaged a contractor to build upon an analysis of large dollar transactions undertaken for the Department of Justice to produce complete accounting results that can be reported to IIM account holders. Id. OHTA has also engaged a contractor to examine accounts opened since the Trust Fund Accounting System ("TFAS") was installed in 1999. Id. at 26. This project is expected to produce accounting results to IIM account holders, as well as identify and resolve issues related to the reconciliation of automated and manual IIM records. Id. at 26-27.

In addition to the ongoing projects that will result in final accountings for thousands of IIM beneficiaries, OHTA and its contractors have initiated several projects to improve the accuracy and efficiency of the overall historical accounting effort. These projects include an inventory of IIM records at the Indian Trust Accounting Division of the General Services Administration and a project to identify and link multiple accounts associated with a single IIM account holder. Id. at 27. OHTA has also assumed responsibility for the collection of missing information from third parties. Id. at 28, 31-38. The Court Monitor correctly notes that OHTA has no date limitation on its efforts to collect missing information from third party custodians. See Fifth Report at 7 n.2.

OHTA's work builds on projects initiated during the previous administration. As reported in Interior's Response to the First Report of the Court Monitor, Ernst & Young, LLP

was retained to reconcile the accounts of the five named Plaintiffs using the documents located during the search for records responsive to Paragraph 19 of the Court's First Order for Production of Information. See Interior's Response To The First Report Of The Court Monitor at 4 & Ex. 3 attached thereto. Ernst & Young submitted a report to Interior (which was subsequently filed with the Court) that concludes that the documents gathered by Interior support substantially all of the dollar value of the transactions in each of the named Plaintiffs' IIM accounts and provide sufficient contemporaneous evidence that the relevant transactions occurred and were recorded accurately in the ledgers. Id.

Morgan Angel & Associates, L.L.C. and Historical Research Associates, Inc. have prepared reports and case studies examining the historical policies and business practices affecting IIM accounts. See id. at 5-6 & Exs. 4, 7 & 8 attached thereto. These reports will be invaluable in informing OHTA's efforts. Arthur Andersen, L.L.P. is reconciling high-dollar non-interest collections recorded between 1985 and 1998, and has in the process analyzed "over $1.2 billion in credit throughput and over 250 thousand transactions." Id. at 6 & Ex. 9 attached thereto. As noted above, OHTA is building on this work to prepare accountings that can be reported to IIM account holders.

Thus, Interior's work is further along than a "plan for a plan." The Judgment pilot project is complete, is undergoing quality review, and will result in accounting statements for approximately 8,000 IIM account holders. The Per Capita pilot project is nearing completion, and is expected to contribute to accountings for many additional account holders. As explained above, Interior is focusing first on relatively straightforward accounting projects, and will build

on the knowledge gained from those projects as increasingly difficult accounting projects are undertaken.

**B. The Historical Accounting Effort Will Be Enormously Complex And Will Take Considerable Time At Substantial Expense.**

The myriad types of transactions that flow through the IIM trust indicate that IIM accounts are in no sense homogeneous. There is no common source of trust income. Some individuals do not own trust land, but instead have trust funds derived only from judgment awards or tribal per capita distributions. Other individuals own allotments that generate funds from oil and gas royalties, farming or grazing leases, timber cutting contracts, hospitality leases, land sales, or rights of way. Many individuals receive trust income from several different sources. Some individuals have entered settlement agreements with Interior in the past that may affect Interior's duty to account to a particular individual for periods covered by a settlement agreement. Statute of limitations issues may affect the accounting to which a particular individual is entitled, as this Court and the Court of Appeals recognized. See Cobell v. Norton, 240 F.3d at 1110; Cobell v. Babbitt, 91 F. Supp. 2d at 32 n.22. The effect of probate of a predecessor's account may or may not be relevant in determining the accounting required for an individual. Thus, numerous fact-based details will affect singly or in various combinations the accountings required for individual IIM account holders or subclasses of account holders. Interior anticipates that research into and analysis of these factual issues will provide an appropriate factual context for decisions affecting the scope of the accountings due particular individuals (or homogeneous subclasses of individuals).

To put the historical accounting project in context, it is instructive to examine the work of the Indian Claims Commission ("Commission"), which was established in 1946 as a quasi-judicial independent agency for the purpose of hearing and determining Indian claims against the United States that accrued prior to August 13, 1946. Accounting cases were "the second most numerous type of claim." Final Report, United States Indian Claims Commission, August 13, 1946 - September 30, 1978 ("ICC Final Report") at 8 (attached as Exhibit 1). The enabling act that created the Commission "granted it a 10-year life span and did not provide for extension on the contingency that it might not complete its work." Id. at 12. But "[i]t soon became obvious that the job was too complex to be accomplished within the time limit[;] . . . [t]he number of claims, the difficulty and complexity of the cases and the large amounts of highly technical and historical evidence necessary to decide each case were factors which proved to be barriers to any hope of speedy disposition of cases." 1969 Annual Report, Indian Claims Commission at 2 (attached as Exhibit 2). Therefore, "Congress extended the life of the Commission in 1956, and again in 1961, 1967, 1972, and 1976 because the job was still unfinished." ICC Final Report at 12 (Ex. 1). The Commission stated:

> The fact was that the time span of 20 years (or even 32 as it developed) was not an exorbitant one to resolve the immense and complex backlog of work involved in over 600 claims covering 150 years. The case exhumation and presentation, and the defense in the courtroom context was inherently a lengthy procedure.

Id.

Of course, differences exist between the claims heard by the Commission and the claims advanced by Plaintiffs in this case. The Commission addressed only tribal claims because "[a]cceptance of individual claims . . . was against the intent of Congress and would have

resulted in a docket too huge to manage." Id. at 10. The claims were more akin to Tucker Act claims than APA claims. However, many of the obstacles reported by the Commission are now facing Interior. The Commission reported that the accounting cases "required an accounting by the Government of any funds belonging to Indians, how they came into being, how they were expended, and what balances were held in the United States Treasury." Id. at 8. "Many of these records were quite old and the accounting involved thousands of transactions." Id. In this case, Plaintiffs are advancing several hundred thousand individual claims – hundreds of times the number of claims examined by the Commission – that may cover a time period of up to 115 years. Providing an historical accounting for each of several hundred thousand Plaintiffs will obviously require considerable time and expense.

As the Court Monitor notes, this Court has previously stated that ". . . lack of funding cannot be allowed to legally impair the United States' trustee-delegates' exacting fiduciary duties toward management of this trust." Fifth Report at 11 n.5 (quoting Cobell v. Babbitt, 91 F. Supp. 2d at 48). The Court Monitor concludes that "[t]he best and most complete, not the cheapest, method to perform the accounting should be the goal of the Secretary of the Interior and her Executive Director." Id. Neither the Secretary nor the Executive Director of OHTA has stated that the goal of the historical accounting project is to find the "cheapest" method to perform the accounting. What Interior *has* stated is that the mission of the historical accounting project is "to plan and conduct a valid, *cost-effective*, and timely accounting of the IIM trust *in a manner that satisfies the Department's fiduciary duty to account to IIM beneficiaries*." Blueprint For Developing The Comprehensive Historical Accounting Plan for Individual Indian Money Accounts at 20 (emphasis added). Plainly, Interior recognizes that the historical accountings

must be performed in a manner that satisfies the Department's fiduciary duty regardless of the methods selected to conduct the accounting.

### C. Judicial Consideration of Potential Issues Relating to the Scope of an Accounting Should Await Issuance of Final Agency Decisions on Such Matters.

The Court Monitor concludes that this Court should rule on Defendants' pending summary judgment motions and "set a briefing schedule in which the parties can further address any other issues that they may wish to place before this Court on their interpretations of its December 21, 1999 historical accounting declaratory judgment." Fifth Report at 16-17. The Court Monitor also suggests in a footnote that the Court consider Plaintiffs' pending motion to set a trial date for the Phase II trial, and decide "what will be expected as proof of the historical accounting." Id. at 17 n.8. These conclusions and recommendations are inconsistent with the nature of this action.

#### 1. The Administrative Procedure Act.

Both this Court and the Court of Appeals clearly held that the APA provides the waiver of the United States' sovereign immunity for this action. This Court held that "Section 702 of the APA waives [Defendants'] sovereign immunity for all of [P]laintiffs' claims that this court will consider." Cobell v. Babbitt, 91 F. Supp. 2d at 24. The Court of Appeals ruled that "[i]nsofar as the [P]laintiffs seek specific injunctive and declaratory relief – and, in particular seek the accounting to which they are entitled – the government has waived its sovereign immunity under [section 702 of the APA]," and, accordingly, "federal courts have jurisdiction to hear such claims under the APA." Cobell v. Norton, 240 F.3d at 1094-95 (citing Bowen v. Massachusetts, 487 U.S. 879, 894-95 (1988)).

However, the APA defines the scope of the Court's jurisdiction to review Plaintiffs' claims. Both this Court and the Court of Appeals recognized that "[w]hether there is a final agency action is [] a jurisdictional question." Id. at 1095; see Cobell v. Babbitt, 91 F. Supp. 2d at 35-36 ("Finality of agency action is generally a jurisdictional prerequisite under the APA."). The Court of Appeals questioned whether the High Level Implementation Plan or the preexisting accounting system used to administer the IIM trust constituted final agency action, but determined that this Court had jurisdiction over Plaintiffs' claims because the APA permits federal courts to "exercise jurisdiction to compel agency action 'unlawfully withheld or unreasonably denied.'" Cobell v. Norton, 240 F.3d at 1095 (quoting 5 U.S.C. § 706). The Court of Appeals agreed with this Court that Defendants "unreasonably delayed the discharge of their fiduciary obligations," and upheld this Court's exercise of jurisdiction under 5 U.S.C. § 706 on that basis. Id. at 1097.

The APA permits judicial review of "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. "A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action." Id. The APA defines the scope of judicial review as follows:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall –
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> (1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be –

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

5 U.S.C. § 706.

Thus, the APA dictates the nature, extent, and timing of any review of Interior's historical accounting efforts.[3] Both this Court and the Court of Appeals noted that courts "cannot 'become . . . enmeshed in the minutiae' of agency administration.'" Cobell v. Norton, 240 F.3d at 1108 (quoting Cobell v. Babbitt, 91 F. Supp. 2d at 54, in turn quoting Bell v. Wolfish, 441 U.S. 520, 562 (1979)). Rather, "[i]t is proper for a court to allow the government 'the opportunity to cure the breaches of trust declared' by the court." Id. at 1108-1109 (quoting Cobell v. Babbitt, 91 F. Supp. 2d at 54). Accordingly, the Court of Appeals presumed that "the district court plans to

[3] As for the standard of review, the Court of Appeals ruled that deference under Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984), "is not applicable in this case." Cobell v. Norton, 240 F.3d at 1101. Rather, '[t]he governing canon of construction requires that 'statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.'" Id. (quoting Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985). Thus, "even where [an] ambiguous statute is one entrusted to an agency, [courts] give the agency's interpretation 'careful consideration' but '[] do not defer to it.'" Id. (quoting Muscogee (Creek) Nation v. Hodel, 851 F.2d 1439, 1445 n.8 (D.C. Cir. 1988).

wait until a proper accounting can be performed, at which point it will assess [Defendants'] compliance with their fiduciary obligations." Id. at 1110.

As explained above, Interior is taking the actions necessary to bring itself into compliance with law by planning and implementing the historical accounting for IIM funds. It is obvious that, regardless of the approach taken, significant portions of this project will be enormously complex, and developing an appropriate approach to all aspects of the required historical accounting, and the implementation of such a plan, will take a considerable amount of time. At this point, Interior must be allowed to do its work. The Court of Appeals cautioned:

> [W]e expect the district court to be mindful of the limits of its jurisdiction. It remains to be seen whether in preparing to do an accounting the Department takes steps so defective that they would necessarily delay rather than accelerate the ultimate provision of an adequate accounting, and the detection of such steps would fit within the court's jurisdiction to monitor the Department's remedying of the delay; beyond that, supervision of the Department's conduct in preparing an accounting may well be beyond the district court's jurisdiction.

Id. at 1110. The Court plainly has jurisdiction to monitor Interior's actions in coming into compliance with its duty to account. Nonetheless, the APA limits the Court's jurisdiction to act in the absence of final agency action.

As the Supreme Court stated,

> [a]s a general matter, two conditions must be satisfied for agency action to be "final:" First, the action must mark the consummation of the agency's decisionmaking process – it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined or from which legal consequences will flow.

Bennett v. Spear, 520 U.S. 154, 177-78 (1997) (internal quotations and citations omitted). Interior has not yet taken final agency action with regard to any of the historical accountings.[4] As described above, many outstanding legal and practical issues (some recognized explicitly by this Court as well as the Court of Appeals) potentially affect the scope of the accounting for particular individual account holders (or subclasses of account holders), including but not limited to the effect of relevant statutes of limitations, the date an account was opened, the effect of probate proceedings for the estate of a predecessor, and prior settlements of IIM account holders' claims. These issues, which involve the application of law to potentially diverse factual predicates, cannot, consistent with this Court's jurisdiction under the APA, be reviewed in the absence of a final agency decision and should not, in any event, be decided in the abstract without factual context.

The Court Monitor's conversations with the Executive Director and the Deputy Director of OHTA reveal that the agency is in the midst of a decision making process.[5] As facts are developed, final agency actions will be taken by the Secretary and her factual and legal determinations will be subject to review by the Court. The Court Monitor's speculation that

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[4] As explained above, Interior expects that final agency action on the accountings for approximately 8,000 Judgment accounts will provide the basis for the Court's first review of the accounting work.

[5] The Court Monitor states that the discussion in Interior's Eighth Report regarding the collection of information from outside sources and statements in OHTA's "Blueprint For Developing The Comprehensive Historical Accounting Plan For Individual Indian Money Accounts" and its "Report Identifying Preliminary Work for the Historical Accounting" "indicated that the Executive Director had come to a decision on the legal scope of the accounting he would follow." Fifth Report at 14. Interior respectfully disagrees that any of the quoted passages indicate that such decisions have been made. Indeed, the Court Monitor's reporting of his January 22, 2002 meeting with OHTA makes clear that no such decisions have been made. See Fifth Report at 14-15.

"someone – perhaps Defendants' attorneys – believe that the Court-defined scope of the historical accounting can be properly limited by an administrative decision by the Secretary," Fifth Report at 18, is not correct. The Court of Appeals made clear that this is an APA case, and the APA permits review of "final agency action." No final agency action that is inconsistent with this Court's declaratory judgment order or otherwise not in accordance with law would survive such review.

### 2. Response To The Court Monitor's Recommendations Regarding Defendants' Three Motions For Partial Summary Judgment and Plaintiffs' Motion To Set A Trial Date.

Defendants coincidentally filed a motion to withdraw their three pending summary judgment motions on the same day the Court Monitor filed his Fifth Report.[6] As Defendants explained in their motion, the summary judgment motions have been overtaken by events in this case (most notably the decision of the Court of Appeals and the creation of OHTA) and should not be decided by the Court at this time. Permitting the withdrawal of those motions will be consistent with the Court's APA jurisdiction and avoid potential problems with opinions that are advisory in nature. Thus, Interior disagrees with the Court Monitor's conclusion that the Court should "consider the Defendants' partial summary judgment motions at this time," Fifth Report 17, and with his suggestion that the Court "set a briefing schedule in which the parties can further address any other issues that they may wish to place before this Court on their interpretations of its December 21, 1999 historical accounting declaratory judgment," id. Proceeding as the Court

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[6] In the motion, Defendants request the opportunity to file supplemental briefs to address the effect of events subsequent to the filing of the original motions should the Court not permit withdrawal of the partial summary judgment motions.

Monitor suggests would be inconsistent with the APA and would likely result in premature (and constitutionally impermissible) advisory opinions.

The Court Monitor also suggests that the Court consider Plaintiffs' outstanding motion to set a trial date for the Phase II trial. Fifth Report at 17 n.8. The Court Monitor believes that "[a] decision on that trial date and what will be expected as proof of the historical accounting could well give the Defendants and Congress a better idea of the necessary resources and funds to complete the historical accounting in the time allotted by this Court." Id. The Court Monitor appears to suggest that this Court set a trial date as the deadline for completion of the entire historical accounting effort and dictate the specific requirements of the historical accounting. This suggestion is not consistent with the nature of this case.

As this Court observed, "the focal point of [the] court's APA review 'should be the administrative record already in existence, not some new record made initially in the reviewing court.'" Cobell v. Babbitt, 91 F. Supp. 2d at 37 (quoting Camp v. Pitts, 411 U.S. 138, 142 (1973)). "The task of the reviewing court is to apply the appropriate APA standard of review, 5 U.S.C. § 706, to the agency decision based on the record the agency presents to the reviewing court." Florida Power & Light Co. v. Lorion, 470 U.S. 729, 743-44 (1985); see 5 U.S.C. § 706 ("[T]he court shall review the whole record or those parts of it cited by a party. . . .").

Thus, the record before the agency, not some new record developed at trial, should form the basis of this Court's review of Interior's actions. Indeed, the Special Master recognized this in his September 2001 Opinion and Order addressing the effect of the Court of Appeals decision on discovery:

> Acknowledging that "supervision of the Department's conduct in preparing an accounting may well be beyond the district court's jurisdiction," Cobell, 240 F.3d at 1110, the D.C. Circuit observed 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." Id. at 1104. In keeping with this acknowledgment and the Circuit's general admonition to the District Court to remain "mindful" of its jurisdiction, it appears that if there is any arena within which defendant agencies might be expected to exercise their discretion and expertise, it should be in the choice and implementation of an accounting method. Permitting the agencies to formulate their own methodology without subjecting every nuance of the decision-making process to inspection and challenge is ultimately in the interest of the plaintiff class, insofar as it should expedite the ultimate resolution in this case. The natural corollary of granting agencies some deference is, however, the required expectation that an administrative record will be created in accordance with traditional APA standards.
>
> Partially shielding defendants from discovery relating to their decision-making process does not, however, immunize that process from review. If, after a record is proffered (or if no record is proffered after a reasonable amount of time as determined by the Court), plaintiffs can make a showing that it is insufficient, either on its face, or because it excludes relevant documents, discovery relating to those infirmities may be permitted.

Sept. 28, 2001 Opinion and Order of Special Master at 13-14.

Accordingly, the Court Monitor's suggestion that it is appropriate for the Court to decide "what will be expected as proof of the historical accounting" is not consistent with the scope of judicial review permitted by the APA. Deciding "what will be expected as proof of the historical accounting" would be deciding what must be in the administrative record and, therefore, how the historical accountings must be conducted – a decision left to Interior, as the Court of Appeals made clear.

As for the Court Monitor's suggestion that the Court fix a trial date, Defendants explained in their response to Plaintiffs' motion to set a trial date that the request is not consistent with the Court of Appeals decision outlining the limits of this Court's jurisdiction, and, in any event, asks for relief that is not feasible by requiring that all of the historical accountings be completed by a date certain. See Defendants' Opposition To Plaintiffs' Motion To Set A Trial Date For Phase II Of This Action. As explained above, the review of Interior's final historical accountings should be based on the administrative record prepared and submitted to the Court. In an APA case, the district court is a reviewing court; it does not normally act as a fact finder. Florida Power & Light Co., 470 U.S. at 744 ("The factfinding capacity of the district court is . . . typically unnecessary to judicial review of agency decisionmaking."). A determination regarding the extent – if any – to which factfinding will be necessary cannot be made until the administrative record supporting a final agency action is before the Court.

Moreover, setting a trial date would prematurely compel the completion of the historical accountings by a date certain. Interior agrees with this Court and the Court of Appeals that an accounting is long overdue, and has taken substantial steps to begin what can only be described as a monumentally complex task (and, according to the Court Monitor, "has made more progress in that effort in six months than the past administration did in six years," Fifth Report at 18). The Court of Appeals presumed that "the district court plans to wait until a proper accounting can be performed, at which point it will assess appellants' compliance with their fiduciary obligations." Cobell v. Norton, 240 F.3d at 1110. Of course, this Court will continue to monitor Interior's progress in discharging its fiduciary duties through the quarterly reporting process. As accountings which constitute final agency action are completed for individual IIM account

holders or subclasses of account holders, the Court will review Interior's work. For the reasons set forth in Defendants' Opposition to Plaintiffs' Motion To Set A Trial Date For Phase II Of This Action, however, it is premature at this point to establish a date certain for the completion of several hundred thousand historical accountings.

**D. Response To The Court Monitor's Reporting On The Mental Processes of OHTA Officials.**

Also inconsistent with the nature of this case are the significant portions of the Fifth Report addressing the mental processes of OHTA officials who are in the midst of decision making.[7] Probing of the mental processes of administrative officials is disfavored when a final agency action is reviewed.[8] See, e.g., Citizens To Preserve Overton Park, Inc. v. Volpe, 401 U.S.

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[7] See, e.g., Fifth Report at 15 ("The accounting method that was and still is to be determined by the Defendants has apparently become not only a *method* for accomplishing the accounting but also, in the mind of the mind of the Executive Director, a vehicle for determining the *scope* of that accounting due to outstanding and yet-to-be-discovered legal issues."); id. at 11-12 ("[The Deputy Director], when first asked by the Court Monitor to define his understanding of the 'scope' of the historical accounting as addressed by the Executive Director in his reports could not explain what the terminology meant in either document. . . . It was his understanding that, using various techniques, it might be possible to compile an accurate accounting of those records without the need to examine all records going back to the award of the first Indian Trust allotments. That would be the practical method for determining the scope of the accounting in his view. However, he was not aware of whether that would satisfy this Court's and the Circuit Court's decisions addressing the scope of the historical accounting. He also had no clear idea of whether it would be necessary to account for direct pay monies or those accounts settled prior to 1951 by the Treasury or GAO."); id. at 12 ("[I]t was [the Executive Director's] understanding that the question of whether this Court's decision regarding 'all funds' included a requirement to reconcile funds deposited in deceased account holders' accounts as opposed to living account holders was still unanswered. Thus, in Edwards' opinion, the scope of the accounting might properly be limited to the accounts of living account holders.").

[8] In the context of discovery, probing the mental processes of decision makers is "permissible in only two circumstances: when it 'provides the only possibility for effective judicial review and . . . there have been no contemporaneous administrative findings' (so that without discovery the administrative record is inadequate for review), and when 'there has been a (continued...)

402, 420 (1971) ("[I]nquiry into the mental processes of administrative decisionmakers is usually to be avoided."), *overruled on other grounds by* Califano v. Sanders, 430 U.S. 99 (1977); United States v. Morgan, 313 U.S. 409, 422 (1941) (It is "not the function of the court to probe the mental processes of [administrative officials;] [j]ust as a judge cannot be subjected to such a scrutiny . . . , so the integrity of the administrative process must be equally respected."); Gottlieb v. Pena, 41 F.3d 730, 737 (D.C. Cir. 1994) ("[P]arties have no right to inquire into an agency's mental processes."); Louisiana Ass'n of Indep. Producers v. Federal Energy Regulatory Comm'n, 958 F.2d 1101, 1114 n.5 (D.C. Cir. 1992) (same); National Courier Assoc. v. Board of Governors of the Federal Reserve Sys., 516 F.2d 1229, 1242 (D.C. Cir. 1975) ("Unless he has left no other record of the reasons for his decision, the mental processes of an administrator may not be probed."). Where no final agency action has yet been taken, probing the mental processes of decision makers as they make their decisions is particularly questionable, and risks premature judicial interference with the agency's decision making process. The decision making process is dynamic; it evolves as information is obtained and knowledge is gained. Snapshots of the mental

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[8](...continued)
strong showing of bad faith or improper behavior' (so that without discovery the administrative record cannot be trusted)." Saratoga Dev. Corp. v. United States, 21 F.3d 445, 458 (D.C. Cir. 1994) (quoting Community for Creative Non-Violence v. Lujan, 908 F.2d 992, 997 (D.C. Cir. 1990) and Overton Park, 401 U.S. at 420); see also AMFAC Resorts v. United States Dep't of the Interior, 143 F. Supp. 2d 7, 12 (D.D.C. 2001) ("[A] party must make a significant showing – variously described as a 'strong,' 'substantial,' or 'prima facie' showing – that it will find material in the agency's possession indicative of bad faith or an incomplete record."). Here, inasmuch as no final agency action has occurred, it is premature to determine whether the record is sufficient to permit review. There has been no allegation of bad faith or improper behavior on the part of the decisionmakers at OHTA. Accordingly, as discussed above, the Special Master has precluded discovery for the time being as to Interior's decision making processes.

processes of decision makers before a final decision is made and speculation about what a decision maker might decide should not be the subject of judicial inquiry.

## CONCLUSION

For the reasons set forth above, Interior objects to the Court Monitor's conclusion that it is still not in compliance with this Court's December 21, 1999 declaratory judgment. The agency is making diligent progress on an enormously complex historical accounting project, and, indeed, is in the final stages of preparing accountings for approximately 8,000 IIM account holders. Moreover, for the reasons set forth above, Interior submits that the Court Monitor's recommendations that the Court (1) rule on the pending summary judgment motions Defendants have sought leave to withdraw, (2) set a briefing schedule in which the parties can address additional issues, (3) set a trial date, and (4) decide what will be expected as proof of the historical accounting are inconsistent with the nature of this action and the Court's APA jurisdiction.

Dated: March 1, 2002

Respectfully submitted,

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

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

OF COUNSEL:
Sabrina A. McCarthy
Department of the Interior
Office of the Solicitor

CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on March 1, 2002, I served the foregoing Department of the Interior's Response to The Fifth Report of The Court Monitor, by facsimile only, in accordance with their written request of October 31, 2001, upon:

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

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

by facsimile, and by ordinary mail, upon:

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

by U.S. Mail upon:

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

and by hand delivery upon:

Joseph S. Kieffer
Court Monitor
420 7th Street, NW
Apt 705
Washington, DC 20004

K. P. Kingston

Kevin P. Kingston