IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

OPPOSITION TO PLAINTIFFS' MOTION TO AMEND THEIR MOTION TO REOPEN TRIAL ONE IN THIS ACTION TO APPOINT A RECEIVER

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INTRODUCTION

In their Motion To Amend Their Motion To Reopen Trial One In This Action To Appoint A Receiver,[1] Plaintiffs ask this Court to appoint a receiver to assume the duties of the Secretary of the Interior ("Secretary") "relating to the administration and management of assets of individual Indian trust beneficiaries that have been conferred upon [her] by Congress." Pls.' Proposed Order at ¶ 14. Relying almost exclusively on reports of the Court Monitor, which are not evidence and are subject to de novo review,[2] Plaintiffs submit that the Secretary is unfit as trustee-delegate of individual Indian money ("IIM") trust accounts and that the Court must, therefore, replace the Secretary with a receiver empowered to administer and manage IIM trust accounts and to develop and implement trust reform. See Pls.' Consolidated Mot. at 1-16.

The relief Plaintiffs seek is beyond this Court's authority to provide because the United States Constitution prohibits appointment of a receiver to assume the trust management and reform duties Congress has conferred on the Secretary. In any event, as we advised the Court on November 14, 2001, the Secretary is reorganizing the Department of the Interior ("Interior") to improve the management of Indian trust assets. This reorganization, described in section II, infra, results from concerted efforts by Interior to create a management structure that can

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[1] Plaintiffs consolidate their motion to appoint a receiver with a motion for an order to show cause why the Interior Defendants and others should not be held in contempt. This brief addresses only the motion to appoint a receiver; the United States Attorney will respond separately to the motion for an order to show cause.

[2] See April 16, 2001 Order appointing Joseph S. Kieffer III as Court Monitor, at ¶ 14 ("In any proceeding before this Court, Mr. Kieffer's findings of fact shall be reviewed de novo.").

effectively implement trust reform and eliminate problems identified by the Court, the Court Monitor, the Special Master and Interior.

ARGUMENT

I. THE CONSTITUTION BARS APPOINTMENT OF A RECEIVER.

This Court cannot, consistent with its Article III power, divest the Secretary of the Interior of trust management and reform duties by appointing a receiver to assume those duties.[3] Although such a remedy may be available in common-law trust cases involving private parties, Congress has bestowed statutory trust duties on the Secretary, and the Constitution prohibits this Court from dislodging them. Shifting these duties from the Executive Branch to an officer of the Judicial Branch would contravene the Appointments Clause, general principles of separation of powers, and Articles I, II, and III of the Constitution, and would be limited by the Appropriations Clause.

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[3] Although Plaintiffs' proposed order purports to exempt the Department of the Treasury ("Treasury") from the putative receiver's reach, the order would require the Secretary of the Treasury to "cooperate with the [r]eceiver and his delegate," id.; would provide the receiver "full and complete access to all trust property and revenues therefrom," id. at ¶ 10; and would enjoin *all* defendants (including the Secretary of the Treasury) from "interfering with the custody of the [r]eceiver over the property [and] assets . . . of the IIM trust," id. at ¶ 20. As the D.C. Circuit recognized, "Treasury holds and invests IIM funds at the Interior Department's direction and provides accounting and financial management services." Cobell v. Norton, 240 F.3d 1081, 1088 (D.C. Cir. 2001). IIM trust funds rely upon the same collection, payment reconciliation, investment, and accounting systems that are relied upon by every agency in the federal government. In this system, Treasury's handling of IIM funds cannot be easily isolated from its handling of any of the other funds on deposit at the Treasury. Thus, to the extent a receiver is given control over IIM funds at the Treasury, such authority over Treasury's operations would raise the same constitutional problems with regard to Treasury as are described in this brief with regard to Interior. For all of the reasons that court appointment of a receiver over the trust functions of Interior would be unconstitutional, appointment of a receiver with control over any trust functions of the Department of the Treasury is also proscribed by the Constitution.

A. Appointment Of A Receiver Would Violate The Appointments Clause.

The Appointments Clause provides:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2. "[T]he Appointments Clause of Article II is more than a matter of 'etiquette or protocol;' it is among the significant structural safeguards of the constitutional scheme." Edmond v. United States, 520 U.S. 651, 659 (1997). Under this clause, courts of law can never appoint principal officers, and can appoint inferior officers only when Congress has explicitly vested them with power to make such appointments.

That a receiver with the authority to manage the IIM trust system and to develop and implement trust reform would be an officer – either principal or inferior – within the meaning of the Appointments Clause cannot be doubted. Plaintiffs seek a receiver who would "have and exercise the authority and powers over matters relating to the administration and management of assets of individual Indian trust beneficiaries that have been conferred upon the Interior Secretary by Congress." Pls.' Proposed Order at ¶ 14. These duties are those of a principal officer – the Secretary of the Interior – appointed by the President with the advice and consent of the Senate. An officer whose work is not "directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate" is a principal officer. See Edmond, 520 U.S. at 662-63. Because the Secretary reports directly to the

President, she is a principal officer. As such, the Appointments Clause prohibits any individual who is not appointed by the President with the advice and consent of the Senate from assuming her duties. A receiver appointed by the Court, therefore, may not assume the duties of the Secretary.

But even if a receiver were not a principal officer, he or she would clearly be an inferior officer who exercises significant authority pursuant to the laws of the United States. A government official is at least an inferior officer if he or she "exercis[es] significant authority pursuant to the laws of the United States." Buckley v. Valeo, 424 U.S. 1, 126 (1976); see also Edmond, 520 U.S. at 662 ("The exercise of 'significant authority pursuant to the laws of the United States' marks . . . for Appointments Clause purposes . . . the line between officer and nonofficer."); Doolin Sec. Sav. Bank v. Office of Thrift Supervision, 139 F.3d 203, 205 (D.C. Cir. 1998) ("[An official] exercis[ing] 'significant authority pursuant to the laws of the United States' . . . undoubtedly qualifies as an 'Officer' under the Constitution, and is thereby subject to the Appointments Clause . . . of the Constitution."). Among the specific duties contemplated by the Plaintiffs for the receiver are: (1) taking possession and custody of all property, income, revenue, investments, books, and records of the IIM Trust; (2) directing the "function[s], right[s] [and] power[s]" of "the Interior defendants and all agents and employees thereof" with respect to the IIM Trust; and (3) proposing, developing and executing a plan of trust reform. Pls.' Proposed Order at ¶¶ 4-6. The receiver's proposed authority could hardly be more significant.

The Court need not decide whether a court-appointed receiver would be a principal or inferior officer because, either way, the appointment would violate the Appointments Clause. If the receiver is a principal officer, the clause mandates that he or she be nominated by the

President and confirmed by the Senate. If the receiver is an inferior officer, the Appointments Clause permits a court to appoint him or her only if "Congress [has] by Law vest[ed] the Appointment . . . in the Courts of Law." U.S. Const. art. II, § 2, cl. 2. Accordingly, courts can appoint inferior officers only to the extent that Congress has vested such power in them through *express* statutory authority.

Plaintiffs point to no statutory authority vesting appointment of a receiver to administer and manage the IIM trust system in the courts of law – indeed they ignore the Appointments Clause altogether. Nor *can* they point to any statutory authority. Not only has Congress not granted the federal courts authority to appoint a receiver to administer and manage the IIM trust system, it has not granted the courts authority to appoint receivers to assume operation of *any* Executive Branch agencies. Cf. 28 U.S.C. § 1361 (authorizing mandamus relief against officers and agencies but not the appointment of receivers to assume their duties). Because Congress has enacted no statute vesting the appointment of a receiver over an Executive Branch agency in the courts of law, the appointment of a receiver to administer and manage the IIM trust system is impermissible under the Appointments Clause of the Constitution.

Plaintiffs' argument that this Court's inherent equitable or remedial powers permit the Court to appoint a receiver is misguided. While, as a general rule, "'the scope of a district court's equitable powers to remedy past wrongs is broad,'" Cobell v. Norton, 240 F.3d 1081, 1108 (D.C. Cir. 2001) (quoting Swann v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 1, 15 (1971)), a court's equitable powers may not be exercised in contravention of the Constitution. INS v. Pangilinan, 486 U.S. 875, 883 (1988) ("'[C]ourts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law.'" (quoting

Hedges v. Dixon County, 150 U.S. 182, 192 (1893)). A federal court may not, pursuant to its general equitable powers, appoint individuals who exercise significant authority because the Appointments Clause provides the exclusive mechanism by which such officers may be appointed, and permits courts to appoint them only when authorized by an act of Congress. Buckley, 424 U.S. at 124-26. If the equitable powers of the federal courts permitted them to circumvent the Constitution in the manner Plaintiffs suggest, no real obstacle would preclude a federal court from replacing Cabinet-level officers with individuals more pleasing to the court under the guise of an exercise of equitable power. Absent congressional authorization (and then only in the case of inferior officers) – which Congress has not provided – this Court is prohibited by the Appointments Clause from exercising even equitable or remedial powers to appoint a receiver to administer and manage the IIM trust system.[4]

Finally, even Congress could not authorize appointment of a receiver in this case. A statute vesting the Court with the power to appoint a receiver would be valid only to the extent that exercise of this appointment power would not be "incongruous" with the judicial power. See Ex parte Siebold, 100 U.S. 371, 398 (1879). Congress cannot vest appointment power in the courts when such power would be inconsistent with Article III and the proper judicial role. See id. As demonstrated in section I.B., infra, appointing a receiver through whom the Court would manage the IIM trust system would far transcend the proper judicial role. Accordingly, even if Congress had authorized the Court to appoint a receiver to manage the IIM trust system, the

[4] For this reason, the discussion on pages 17-35 of Plaintiffs' brief regarding equitable principles of common law is wholly inapposite.

statute would impermissibly exceed constitutional limits on "incongruous" interbranch appointments.

B. Appointment Of A Receiver Would Violate General Separation Of Powers Principles And The Specific Mandates Of Articles I, II, And III.

In addition to violating the Appointments Clause, appointment of a receiver would contravene the separation of powers doctrine by permitting the court to intrude on functions entrusted to the other branches of the federal government and would exceed the Court's authority under Article III of the Constitution.

The doctrine of separation of powers seeks to prevent the aggrandizement of power in any one of the three branches of government. Morrison v. Olson, 487 U.S. 654, 693 (1988) ("[T]he system of separated powers and checks and balances established in the Constitution was regarded by the Framers as 'a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.'" (quoting Buckley v. Valeo, 424 U.S. 1, 122 (1976))). Although no reference to "separation of powers" is found in the text of the Constitution, the doctrine of separation of powers is enforced both as a general principle and through the application of several specific constitutional provisions, including the Appointments Clause and Articles I, II and III of the Constitution.

Articles I , II, and III establish Congress, the President and the judiciary and invest them, respectively, with authority to exercise the legislative, executive, and judicial powers of the United States. See U.S. Const. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States . . . ."); U.S. Const. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America."); U.S. Const. art. III, § 1 ("The

judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."). Concern with maintaining separation of powers profoundly shaped the drafting of the Constitution and of Articles I, II, and III in particular. See Mistretta v. United States, 488 U.S. 361, 380 (1989) ("Madison, in writing about the principle of separated powers [in The Federalist No. 47], said: 'No political truth is certainly of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty.'"); INS v. Chadha, 462 U.S. 919, 951 (1983) ("The Constitution sought to divide the delegated powers of the new federal government into three defined categories, legislative, executive and judicial, to assure, as nearly as possible, that each Branch of government would confine itself to its assigned responsibility."). The Supreme Court has consistently reaffirmed "the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty." Mistretta, 488 U.S. at 380. "Although not 'hermetically' sealed from one another, the powers delegated to the three Branches are functionally identifiable," and no branch of government may exercise authority that interferes with or usurps that delegated by the Constitution to one of its sister branches. Chadha, 462 U.S. at 951 (citation omitted). Thus, general separation of powers concerns, as well as Articles I, II, and III, prohibit the judiciary from undertaking duties delegated by the Constitution to the Executive Branch.

Article II confers on the President the duty to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. This "broad power" is "conspicuously not granted to [courts] by the Constitution." INS v. Legalization Assistance Project of L.A. County Fed'n of Labor, 510 U.S. 1301, 1304-05 (O'Connor, Circuit Justice 1993). "[E]xecutive or administrative duties of a

nonjudicial nature may not be imposed on judges holding office under Art[icle] III of the Constitution." Buckley, 424 U.S. at 123. This broad prohibition upon the courts' exercise of executive or administrative duties of a nonjudicial nature is designed "to maintain the separation between the Judiciary and the other branches of the Federal Government by ensuring that judges do not encroach upon executive or legislative authority or undertake tasks that are more properly accomplished by those branches." Morrison, 487 U.S. at 680-81.

Thus, this Court's authority to appoint a receiver to manage an Executive Branch agency is limited by the federal courts' constitutionally prescribed role. The Constitution limits the authority of federal courts to "[t]he judicial power of the United States." U.S. Const. Art. III, § 1. "According to express provision of Article III, the judicial power of the United States is limited to 'Cases' and 'Controversies.'" Mistretta, 488 U.S. at 385; see also Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787, 816 (1987) (Scalia, J., concurring) ("The judicial power is the power to decide, in accordance with law, who should prevail in a case or controversy."). The key inquiry is whether the Court would exceed its Article III role "to adjudicate cases and controversies as to claims of infringement of individual rights" and intrude upon the duty entrusted to the Executive of "'tak[ing] Care that the Laws be faithfully executed.'" Lujan v. Defenders of Wildlife, 504 U.S. 555, 577 (1992) (quoting U.S. Const. art. II, § 3); see Morrison, 487 U.S. at 677-78 & n.15 ("In several cases, the Court has indicated that Article III 'judicial Power' does not extend to duties that are more properly performed by the Executive Branch."). By ordering the relief Plaintiffs request, the Court clearly would exceed its role.

In the rare cases in which the Supreme Court has upheld the judiciary's assumption of nonadjudicatory functions against a separation of powers or Article III challenge, it has

emphasized that it was doing so only because the judiciary was not encroaching upon the constitutionally delegated functions of another branch, and the nonadjudicatory functions assumed by the judiciary were closely related to the mission of the judiciary. In Mistretta v. United States, 488 U.S. 361 (1989), for example, the Court held that Congress's creation within the judiciary of a Sentencing Commission to promulgate binding sentencing guidelines was not prohibited by the separation of powers doctrine because "Congress may delegate to the Judicial Branch nonadjudicatory functions that do not trench upon the prerogatives of another Branch and that are appropriate to the central mission of the Judiciary." 488 U.S. at 388. The Court noted that sentencing is a field in which the Judicial Branch has significant special knowledge and expertise, id. at 396, and in which the Executive Branch had never exercised the kind of authority vested in the Commission. Id. at 387 n.14. Particularly significant to the Court was that the Commission is an independent agency "not controlled by or accountable to members of the Judicial Branch." Id. at 393. The Court noted that the President's relationship to the Commission was "functionally no different" than if the Commission had been located outside the judicial branch because Congress had empowered the President to appoint and remove Commission members. Id. at 387 n.14. Thus, the Court concluded that the statute did not aggrandize the authority of the Judicial Branch or deprive the Executive Branch of a power it once possessed. Id. at 395.

In Morrison v. Olson, 487 U.S. 654 (1988), the Court offered similar reasons for upholding against a separation of powers challenge a statute authorizing a Special Division of judges to appoint and oversee an independent counsel. The Court held that the statute gave the Executive Branch sufficient control over the independent counsel to ensure that the President

was able to perform his constitutionally assigned duties inasmuch as (1) the Attorney General had the power to remove the independent counsel for good cause; (2) no independent counsel could be appointed without a specific request by the Attorney General; and (3) a decision by the Attorney General not to request appointment of an independent counsel was unreviewable. Id. at 696. The Court suggested strongly that its decision would have been different had "the power to remove an executive official . . . been completely stripped from the President, thus providing no means for the President to ensure the 'faithful execution' of the laws." Id. at 692. Moreover, the Court determined that "the functions that the Special Division is empowered to perform are not inherently 'Executive,'" but generally passive (e.g., receiving reports) or, if requiring the exercise of judgment or discretion, "essentially ministerial," and "directly analogous" to functions performed by the judiciary in other contexts. Id. at 681. The Court noted that:

> in light of judicial experience with prosecutors in criminal cases, it could be said that courts are especially well qualified to appoint prosecutors. *This is not a case in which judges are given power to appoint an officer in an area in which they have no special knowledge or expertise, as in, for example, a statute authorizing the courts to appoint officials in the Department of Agriculture or the Federal Energy Regulatory Commission.*

Id. at 676 n.13 (emphasis added).

In contrast, Court appointment of a receiver to assume the duties of the Secretary "relating to the administration and management of assets of individual Indian trust beneficiaries," Pls.' Proposed Order at ¶ 14, would encroach impermissibly on the constitutionally appointed function of the Executive Branch. A court-appointed receiver is "an officer of the court" and has "no powers except such as are conferred upon him by the order of his appointment." Booth v. Clark, 58 U.S. (17 How.) 322, 331 (1854); accord Sterling v. Stewart, 158 F.3d 1199, 1201 n.2

(11th Cir. 1998). Such a receiver would actively exercise executive functions – functions that are in no sense "passive" or "ministerial" or analogous to functions ordinarily performed by the judiciary. Plaintiffs' assertion that separation of powers concerns are not implicated by the appointment of a receiver because the Secretary's duties are "the ordinary obligations of a trustee," Pls.' Consolidated Mot. at 42, and as such are "far removed from the core constitutional functions of the [E]xecutive [B]ranch," id. at 44, misperceives the constitutional role of the Executive. The core constitutional function of the Executive Branch is to see that the laws are "faithfully executed," U.S. Const. art. II, § 3, and Congress has expressly entrusted the Secretary with the duty to "execute" the laws governing Indian trusts. That these executive and administrative duties have a fiduciary component in no sense transforms them into duties that are adjudicatory in nature.

Nor is the administration and management of the IIM trust system an area in which federal courts have any more special knowledge or expertise than they have with regard to the administration of programs in the Department of Agriculture or the Federal Energy Regulatory Commission.[5] See Morrison, 487 U.S. at 676 n.13. The Secretary is not an ordinary trustee; her trust duties include establishing policies and practices for myriad specialized functions such as trust land management and income collection; appraisal of trust lands; review of land transfers; oversight of grazing leases, timber leases, timber sales, oil and gas production, mineral production, and rights of way; and banking functions. Cobell v. Babbitt, 91 F. Supp. 2d 1, 9-11

[5] Plaintiffs suggest that the receiver they seek "will function in a field – trust law – in which the courts have centuries of experience – including experience with receiverships." Pls.' Consolidated Mot. at 43. That the courts must apply trust law from time to time is wholly irrelevant to whether courts have experience in managing and reforming specialized Executive Branch programs that include trust duties.

(D.D.C. 1999), aff'd, 240 F.3d 1081 (D.C. Cir. 2001). If the Court removes these duties from the Executive in order to perform them itself through a receiver, the Court necessarily will be enmeshed in making discretionary decisions about the management and administration of the IIM trust system and about trust reform that are at the heart of the Executive Branch's constitutionally delegated duty.

Perhaps most significantly, a receiver would be controlled by the Court and accountable only to the Court, stripping the President of the power to remove an executive official and removing any "means for the President to ensure the 'faithful execution' of the laws." Morrison, 487 U.S. at 692; see Mistretta, 488 U.S. at 393-94; cf. Bowsher v. Synar, 478 U.S. 714, 726 (1986) (holding that Congress may not exercise removal power over an officer performing executive functions); Myers v. United States, 272 U.S. 52, 63-64 (1926) (holding that Congress cannot divest the President of power to remove an officer in the Executive Branch whom he was initially authorized to appoint). The Plaintiffs ask that executive functions *currently performed* by the Executive Branch in accordance with the Constitution and congressional directives be *removed* from the Executive Branch and *assumed* by the Judicial Branch. That would exceed the bounds of this Court's Article III authority, intrude upon the duty to "take Care that the Laws be faithfully executed" entrusted to the Executive by Article II, and contravene the doctrine of separation of powers. See Lujan, 504 U.S. at 577; cf. Printz v. United States, 521 U.S. 898, 922-23 (1997) (holding that the Brady Act's transference of federal identity-checking authority to local law enforcement officials deprived the President of "meaningful . . . control" and thereby violated Article II's dictate that the President "take Care that the Laws be faithfully executed.").

In addition, the Court's appointment of a receiver would trench on the prerogatives of Congress, in which the Constitution vests "[a]ll legislative Powers." U.S. Const. art. I, § 1. As this Court recognized, Congress has expressly vested day-to-day supervision of trust reform in the Secretary, with the assistance of the Special Trustee. 25 U.S.C. §§ 162a(d) & 4011; see Cobell v. Babbitt, 91 F. Supp. 2d 1, 13 (D.D.C. 1999) (stating that the American Indian Trust Fund Management Reform Act of 1994 ("1994 Reform Act") "recognized and codified the trust duties of the Secretary of the Interior, as the primary trustee-delegate of the United States, toward the IIM trust."), aff'd, 240 F.3d 1081 (D.C. Cir. 2001).

Congress introduced significant reform in the administration of Indian trust funds in the 1994 Reform Act. For example, the Act created the Office of Special Trustee for American Indians in the Department of the Interior, headed by a Special Trustee who reports directly to the Secretary. 25 U.S.C. § 4042(a). Notably, Congress implemented reforms that would improve the performance of the agencies *within* the Department of the Interior; it conspicuously did not shift trust duties to another agency, much less the courts. See H.R. Rep. No. 103-778, at 8-9 (1994), reprinted in 1994 U.S.C.C.A.N. 3467, 3467-68 (explaining that the purpose of the bill was to "bring about better accountability and management of Indian trust funds *by the Department of the Interior*," that the bill sets out the *Secretary of [the] Interior's* responsibilities," and that the "Special Trustee would oversee and ensure that the reforms take place *throughout the Department of [the] Interior*." (emphasis added)). It is amply clear that Congress did not intend to allow the Secretary to be stripped of her responsibility over Indian trust funds; rather, Congress ensured that the ultimate fiduciary trust responsibility remain with the Secretary.

Nonetheless, Plaintiffs unabashedly seek a receiver who would "have and exercise the authority and powers over matters relating to the administration and management of individual Indian trust beneficiaries *that have been conferred upon the Interior Secretary by Congress.*" Pls.' Proposed Order at ¶ 14 (emphasis added). Plaintiffs fail to recognize that courts "have no authority to substitute [their] views for those expressed by Congress in a duly enacted statute." Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 626 (1978); see also Northwest Airlines, Inc. v. Transport Workers Union of Am., AFL-CIO, 451 U.S. 77, 97 (1981) ("[T]he authority to construe a statute is fundamentally different from the authority to fashion a new rule or to provide a new remedy which Congress has decided not to adopt."); TVA v. Hill, 437 U.S. 153, 194-95 (1978) ("While '[i]t is emphatically the province and duty of the judicial department to say what the law is,' . . . it is equally – and emphatically – the exclusive province of the Congress not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation." (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)). This Court acknowledged as much in its June 7, 1999 opinion:

> Congress has clearly provided that the government is to act as trustee for the IIM monies. This court does not have the power to encroach upon that decision, as such action would violate the doctrine of separation of powers. Congress has created this trust, and only Congress may alter it. This court's duty, as in all other cases, is to interpret and judicially enforce these laws.

Cobell v. Babbitt, 52 F. Supp. 2d 11, 28 n.17 (D.D.C. 1999). Although the Court did not explicitly rule out appointment of a receiver in its discussion of equitable remedies available to Plaintiffs, it did rule out removal of the government as trustee. See id. at 24-25. While Plaintiffs submit that they are not seeking removal of the government as trustee, see Pls.' Consolidated

Mot. at 19, it is difficult to discern the practical difference between removing the Secretary as trustee-delegate of the government – which the Plaintiffs expressly seek, see id. – and the removal of the "government" as trustee. For purposes of separation of powers analysis, no difference exists: Congress provided that the *Secretary* is to act as trustee-delegate of the government, and the Court does not have the power to encroach upon that decision by replacing her with a judicially appointed officer.[6]

Plaintiffs do not discuss (or even mention) the Supreme Court's federal separation of powers jurisprudence discussed above. Instead, they rely exclusively on cases in which state or federal courts have imposed receiverships on state agencies, see Pls.' Consolidated Mot. at 35-44, and make a tortured argument that such cases are relevant because the Framers borrowed the separation of powers doctrine from preexisting state constitutions, see id. at 36-38. While the Framers' idea for dividing federal power between three distinct branches of government was actually borrowed from the "the celebrated Montesquieu," see James Madison, Federalist No. 47, it is true that state constitutions existing at the time of the Constitutional Convention – including Massachusetts' – had already implemented this invaluable doctrine and distributed power between three distinct branches. See, e.g. Mass. Const. (1780). Notwithstanding that fact, it is simply not necessary – indeed it is altogether improper – to rely (much less exclusively so) on court decisions construing state constitutions to interpret the United States Constitution when, as is the case here, the United States Supreme Court has provided substantial guidance on the issue in dispute. See, e.g. Cooper v. Aaron, 358 U.S. 1, 18 (1958) (describing the Supreme Court's

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[6] As explained in section I.A., supra, the Court's equitable powers provide no vehicle for skirting the mandates of the Constitution. INS v. Pangilinan, 486 U.S. 875, 883 (1988).

authority to definitively determine the meaning and application of the United States Constitution as "a permanent and indispensable feature of our constitutional system.") Thus, it is of no import that the State of Massachusetts, after initially distributing power among its constituent parts in its constitution, now allows its courts to impose receiverships on state agencies when a similar imposition on federal agencies would not be allowed under the Supreme Court's separation of powers jurisprudence. Moreover, even if the Supreme Court had no separation of powers jurisprudence, which is simply not the case, the complete (and uncritical) reliance on state court decisions construing state constitutions would be ill advised. It is well settled that state courts are free to interpret state constitutional provisions more broadly than similar or identical provisions of the United States Constitution.[7] See, e.g. Arizona v. Evans, 514 U.S. 1, 8 (1995). Here, there is no evidence that the state court decisions cited by Plaintiffs accurately reflect the Framers' original understanding of the separation of powers doctrine; instead, those decisions reflect the State's current thinking on the matter. In the end, federal separation of power concerns simply are not implicated when a state agency is placed in receivership, and the cases cited by Plaintiffs are wholly inapposite. We are unaware of any case in which a court-appointed

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[7] By way of example, the Fourth Amendment, like most of the provisions of the Bill of Rights, "was derived from provisions already existing in state constitutions." Minnesota v. Carter, 525 U.S. 83, 93 (1998). Of the four state constitutions that contained language virtually identical to that of the Fourth Amendment, see id., one was the Massachusetts Constitution, see Mass. Const., pt. I, Art. XIV (1780) ("Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions."). Despite the similarity between the Fourth Amendment and Article XIV of the Massachusetts Declaration of Rights, "[i]t is by now firmly established that . . . art. 14 affords greater protection against arbitrary government action than do the cognate provisions of the Fourth Amendment." Commonwealth v. Stoute, 665 N.E.2d 93, 96 n.10 (1996); see also Jenkins v. Chief Justice of the Dist. Court Dep't, 619 N.E.2d 324 (1993). As a result, Massachusetts case law is simply not relevant in construing the Fourth Amendment notwithstanding the fact that the Framers borrowed the Fourth Amendment from the Massachusetts Constitution.

receiver has taken over a major administrative responsibility of a federal Executive Branch agency, and Plaintiffs have cited no such case. Under the Constitution, the appointment of a receiver to manage the IIM trust system and develop and implement trust reform would violate the separation of powers doctrine.

C. Appointment Of A Receiver Would Violate The Appropriations Clause.

In addition to violating the Appointments Clause, Articles I, II, and III of the Constitution, and the separation of powers doctrine, appointment of a receiver would violate the Appropriations Clause to the extent that the receivership would require expenditures from the Treasury. The Appropriations Clause provides that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law," U.S. Const. art. I, § 9, cl. 7. Under our system of separated powers, federal courts do not make fiscal policy, nor can they allocate resources of the United States based on judicial notions of equity or fairness. As the Supreme Court has explained, the Appropriations Clause "assure[s] that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents or the individual pleas of litigants." Office of Personnel Mgmt. v. Richmond, 496 U.S. 414, 428 (1990); City of Houston v. Department of Hous. & Urban Dev., 24 F.3d 1421, 1427 (D.C. Cir. 1994) ("'Money may be paid out only through an appropriation made by law; in other words, the payment of money from the Treasury must be authorized by a statute.'" (quoting Richmond, 496 U.S. at 424)). The Appropriations Clause would be violated to the extent that the receiver's duties (or the

receivership itself) require the expenditure of money from the public fisc.[8] "It is beyond dispute that a federal court cannot order the obligation of funds for which there is no appropriation." Rochester Pure Waters Dist. v. EPA, 960 F.2d 180, 184 (D.C. Cir. 1992); accord City of Houston, 24 F.3d at 1426. Thus, even if a receiver could be appointed to oversee the IIM trust system without violating other constitutional provisions, that receiver's powers would necessarily be limited by the Appropriations Clause.

II. THE SECRETARY'S REORGANIZATION PLAN WILL CREATE A SINGLE, ACCOUNTABLE TRUST REFORM OFFICE WITH LINE AUTHORITY OVER INDIAN TRUST FUNCTIONS AND OVERSIGHT BY THE SPECIAL TRUSTEE.

As the United States informed the Court in its Notice of Proposed Department Of The Interior Reorganization To Improve Indian Trust Assets Management, filed November 14, 2001, a reorganization process is underway within Interior to improve the management of trust assets. The proposed reorganization consolidates Indian trust asset management functions in a new agency: the Bureau of Indian Trust Assets Management. Declaration of J. Steven Griles ("Griles Decl.") ¶ 10 (Ex. 1). The proposed Bureau will report to an Assistant Secretary for Indian Trust Assets Management. The Special Trustee for American Indians will continue to perform oversight for the Department's trust reform efforts. The Bureau of Indian Affairs, under the supervision of the Assistant Secretary - Indian Affairs, will continue to provide to Indian tribes and individuals those services that are not related to trust assets. Id. at ¶ 11.

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[8] Moreover, apart from the constitutional problem, to the extent the receiver required appropriations to accomplish his or her mission, he or she (as well as this Court) would be immersed in Interior's – and ultimately the President's – budget process.

Because the proposed reorganization affects many interested parties, Interior has begun consultation with Indian tribes and with Congress. Appropriate notification to departmental employees and union representatives will occur on November 15, 2001. Also, candidates for the Assistant Secretary and the Bureau Director must be found. The Assistant Secretary must be nominated and confirmed. Id. at ¶ 12. The final organization structure will depend upon the results of the consultation process. Implementation will progress as soon as it becomes final.

Trust reform activities will continue during this transition process. Three key subprojects (TAAMS, BIA Data Cleanup, and Probate) will be supervised by Ms. Donna Erwin, previously Deputy Special Trustee for Trust Systems and Projects, under a newly-created Office of Trust Transition in the Office of the Secretary. Planning for the transfer of the remaining subprojects is underway. Project resources needed in the short term are being identified and work with EDS to develop a business model is underway. Id. at ¶ 13.

Meanwhile, OHTA, created by Secretarial Directive on July 10, 2001, has proceeded on its announced schedule with its task of planning, organizing, directing and executing the historical accounting of IIM accounts. On September 10, 2001, OHTA issued a "Blueprint for Developing the Comprehensive Historical Accounting Plan for Individual Indian Money Accounts," which sets forth a description and timetable for completion of all steps necessary to staff and develop the plan for the historical accounting. On November 7, 2001, OHTA issued its "Report Identifying Preliminary Work for the Historical Accounting." It identifies work that is underway and work that can begin immediately to constitute an historical accounting and pilot test possible methods and assumptions about how to conduct the historical accounting, among

other tasks. In the proposed reorganization, OHTA will be a line organization under the new Assistant Secretary. Id. at ¶ 14.

CONCLUSION

For the reasons set forth above, Plaintiffs' motion to appoint a receiver should be denied.

Respectfully submitted,

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Deputy Assistant Attorney General
J. CHRISTOPHER KOHN
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Department of the Treasury
Office of Chief Counsel
Bureau of the Public Debt

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

ORDER

Upon consideration of Plaintiffs' October 19, 2001 Motion To Amend Their Motion To Reopen Trial One In This Action To Appoint A Receiver, it is hereby ordered that Plaintiffs' motion is DENIED.

SO ORDERED this _____ day of _____, 2001.

_____
ROYCE C. LAMBERTH
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DECLARATION OF J. STEVEN GRILES

J. Steven Griles declares as follows:

1. I am the Deputy Secretary, United States Department of the Interior ("Interior").

2. Trust reform has been a major focus of my work on behalf of the Secretary of the Interior since I assumed office in July 2001.

3. At a hearing on October 30, 2001, the Court asked the Government to tell it who is in charge of trust reform. Under the existing trust management structure, the various functions of trust reform are spread among, primarily, the Office of the Special Trustee for American Indians ("OST"), the Bureau of Indian Affairs ("BIA"), and the Office of Historical Trust Accounting ("OHTA"). This dispersal of functions necessitates the assignment of overall authority to an official above these organizations in the chain of command, and I have undertaken that responsibility. However, as discussed below, the Department is currently reorganizing to align trust asset management functions in one, clearly focused bureau.

4. Congress tasked Interior, in the 1994 Indian Trust Reform Act, to improve Indian trust asset management and provide basic fiduciary services to trust beneficiaries. Plaintiffs filed this lawsuit in June 1996.

5. In July 1998, then-Secretary Babbitt published a High Level Implementation Plan ("HLIP") and, in February 2000, published a revised HLIP.

6. The current Special Trustee for American Indians, Mr. Tom Slonaker, took office in June 2000. The Special Trustee has had both oversight for all trust reform as well as some operational responsibility for trust reform and trust asset management.

7. Concerns about the viability of the revised HLIP led Secretary Norton, in June 2001, to commission an independent study of the Department's trust asset management and trust reform efforts. Interior contracted with Electronic Data Systems Corporation ("EDS") to conduct this evaluation. Interior tasked EDS to begin with an assessment of the Trust Asset and Accounting Management System ("TAAMS") and BIA Data Cleanup. EDS is also tasked to determine the current status of trust reform, identify business and technical issues, recommend improvements, and develop a recommended schedule for future improvement efforts.

8. EDS has issued a report entitled "Interim Report and Roadmap for TAAMS and BIA Data Cleanup," dated November 12, 2001 ("EDS Report"). The EDS Report contains the following key recommendations for improving Indian trust asset management:

* Immediately appoint a single, accountable trust reform executive sponsor
* Develop an overarching trust operations business model
* Adopt an overall business and computer systems architecture
* Adopt a consistent information systems acquisition strategy
* Implement consistent technology frameworks, methods, and tools
* Establish a trust program management center
* Execute comprehensive staffing plans for all participating organizations

9. Immediately following the EDS Report, the Special Trustee for American Indians and the Assistant Secretary - Indian Affairs issued a joint memorandum to Secretary Norton (copy, without attachments, is at tab A) recommending what they term "a dramatic change in organization and management structure for Indian trust reform and trust operations." Secretary Norton concurred with their recommendations and directed Interior staff to begin the process of reorganizing Interior's Indian trust asset management.

10. The proposed reorganization consolidates Indian trust asset management functions in a single agency separate from the OST and BIA: the Bureau of Indian Trust Assets Management. (A draft chart of the proposed organization is at tab B.) Segregating these trust functions is intended, as in the private sector, to facilitate the development of performance measures, processes, controls, and systems that are designed to meet Interior's fiduciary obligations.

11. The Bureau of Indian Trust Assets Management will report to an Assistant Secretary for Indian Trust Assets Management. This new Assistant Secretary will have authority and responsibility for Indian trust asset management. The Special Trustee will continue to perform oversight for Interior's trust reform efforts. BIA, under the supervision of the Assistant Secretary - Indian Affairs, will continue to provide those services to Indian tribes and individuals that are not related to trust assets.

12. The proposed reorganization impacts many interested parties. Interior has begun consultation with Indian tribes and with Congress. Appropriate notification to departmental employees and union representatives will occur on November 15, 2001. Also, candidates for the

Assistant Secretary and the Bureau Director must be found. The Assistant Secretary must be nominated and confirmed.

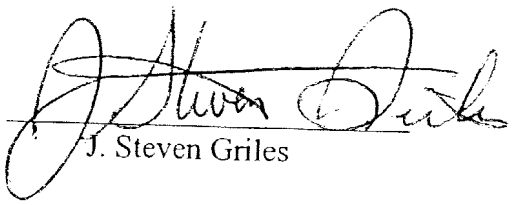
13. Trust reform activities will continue during this transition process. The final organization structure will depend upon the results of the consultation process. Implementation will progress as soon as it becomes final. In the meantime, three key subprojects (TAAMS, BIA Data Cleanup, and Probate) will be supervised by Ms. Donna Erwin, previously Deputy Special Trustee for Trust Systems and Projects, under a newly-created Office of Trust Transition in the Office of the Secretary. Planning for the transfer of the remaining subprojects is underway. Project resources needed in the short term are being identified and work with EDS to develop a business model is underway.

14. Meanwhile, OHTA, created by Secretarial Directive on July 10, 2001, has proceeded on its announced schedule with its task of planning, organizing, directing and executing the historical accounting of IIM accounts. On September 10, 2001, OHTA issued a "Blueprint for Developing the Comprehensive Historical Accounting Plan for Individual Indian Money Accounts," which sets forth a description and timetable for completion of all steps necessary to staff and develop the plan for the historical accounting. On November 7, 2001, OHTA issued its "Report Identifying Preliminary Work for the Historical Accounting." It identifies work that is underway and work that can begin immediately to constitute an historical accounting and pilot test possible methods and assumptions about how to conduct the historical accounting, among other tasks. In the proposed reorganization, OHTA will be a line organization under the new Assistant Secretary.

15. We will advise the Court as further actions are taken. As the official currently in charge of trust reform in the Department, I understand that reorganization by itself does not solve the numerous problems of trust reform, but it does provide an avenue for developing solutions.

16. I declare under penalty of perjury that the foregoing is true and correct.

Executed this 14th day of November, 2001.



J. Steven Griles

Tab A

THE SECRETARY OF THE INTERIOR

WASHINGTON

November 14, 2001

Memorandum

To: Special Trustee for American Indians
Assistant Secretary-Indian Affairs

From: Secretary

Subject: Trust Organization

I have read your November 14, 2001 memorandum including your views on the organization of trust asset management responsibilities. I enthusiastically support and concur in your recommendations.

The Department's refinement of the proposed organization and management structure will greatly benefit from the counsel provided by affected and interested parties. Please ensure that we consult with Congress, the Tribes, Department of the Interior personnel and their unions as well as other interested parties prior to implementing a broad reorganization of Indian trust asset management functions. We must tap into the broad knowledge and experience available from these groups in order to fashion the best organizational structure possible.

It is my understanding that these consultations have already begun, and will continue, consistent with my often-stated policy of communication, consultation, and cooperation with the public we serve.

Gale A. Norton

Secretary of the Interior

United States Department of the Interior

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

November 14, 2001

Memorandum

To: Secretary

From: Special Trustee for American Indians
Assistant Secretary – Indian Affairs

Subject: Trust Organization

Attachment 1 is a proposed organization and management structure for the Department's Indian trust asset management function. A briefing paper with information on the proposed organization and management structure is included in Attachment 2.

As you know, for the past several weeks a senior group has been evaluating alternative trust organization and management structures for Indian trust asset management, identifying several options that could lead to a more effective structure. The Special Trustee contributed a typical structure for trust operations as found in commercial sector trust banking. In addition, the Judge in the Cobell v Norton class action litigation was critical recently of the Department because he could not readily identify a single individual in charge of trust reform. Periodically we have briefed you on the status of our efforts, and received your input on the options.

As we closed on a structure that would establish an effective, accountable organization, it became apparent that a dramatic change in organization and management structure for Indian trust reform and trust operations was needed. Concurrently, EDS was drawing a similar finding and conclusion in its assessment of the TAAMS and BIA Data Cleanup sub projects. At the request of the Deputy Secretary, EDS evaluated the group's proposed organization and structure and commented favorably (Attachment 3). In consonance with EDS' suggestions, a separate element will be organized and devoted to beneficiary services. This element will put the beneficiary—Tribes and Individual Indian account holders—as the focus of the Indian Trust Asset Management organization.

The structure we recommend has the strength of, once and for all, establishing a single, accountable manager and management structure for the conduct of most Departmental Indian trust operations and trust reform.

Therefore, we believe and concur that the Department should reconfigure trust asset management activities along the lines of the organization and management structure found in Attachment 1, and recommend your approval of this organizational concept.

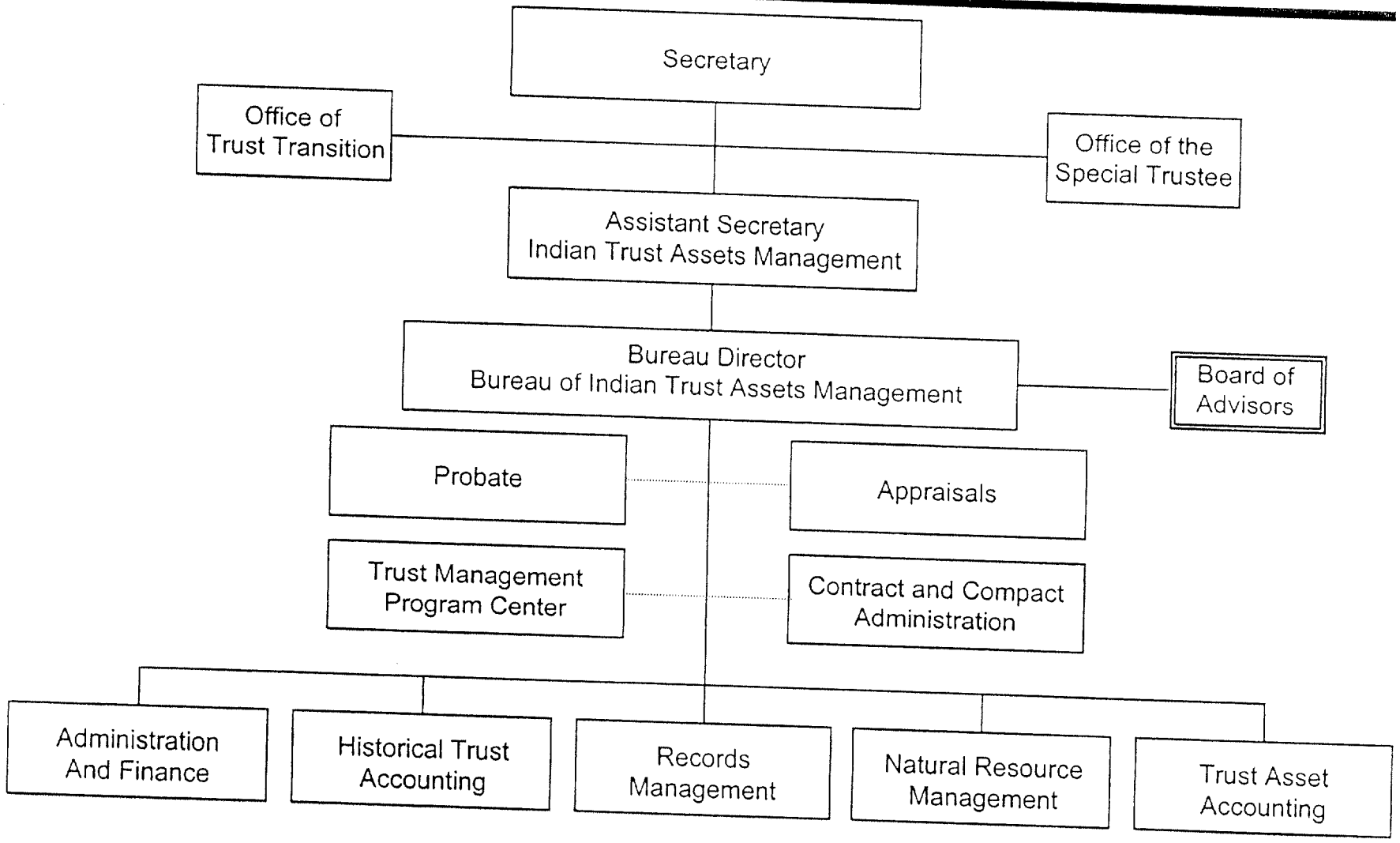
I CONCUR: See 11/14/01 memo
Secretary of the Interior

I DO NOT CONCUR: _____
Secretary of the Interior

3 Attachments, as stated

Tab B

Draft Organizational Chart



November 14, 2001

CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on November 15, 2001, I served the foregoing Opposition To Plaintiffs' Motion To Amend Their Motion To Reopen Trial One In This Action To Appoint A Receiver, by facsimile (in compliance with their written request of October 31, 2001) upon:

Keith Harper, Esq.
Lorna Babby, Esq.
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202-822-0068

Dennis M Gingold, Esq.
Mark Brown, Esq.
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Washington, D.C. 20004
202-318-2372

and by facsimile and U.S. Mail upon:

Alan L. Balaran, Esq.
Special Master
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Washington, D.C. 20006

and by U.S. Mail upon:

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