No. 02-5374

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ELOUISE PEPION COBELL, et al.,

Plaintiffs-Appellees,

v.

GALE A. NORTON, SECRETARY OF THE INTERIOR, et al.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
OR IN THE ALTERNATIVE A PETITION FOR WRIT OF MANDAMUS

REPLY BRIEF FOR THE APPELLANTS

ROSCOE C. HOWARD, JR.
United States Attorney

MARK E. NAGLE
R. CRAIG LAWRENCE
Assistant U.S. Attorneys
U.S. Attorney's Office
Washington, D.C. 20001

ROBERT D. McCALLUM, JR.
Assistant Attorney General

GREGORY G. KATSAS
Deputy Assistant Attorney General

ROBERT E. KOPP
MARK B. STERN
THOMAS M. BONDY
CHARLES W. SCARBOROUGH
SAMBHAV N. SANKAR
(202) 514-5089
Attorneys, Appellate Staff
Civil Division, Room 9108
Department of Justice
601 D Street, N.W.
Washington, D.C. 20530

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GLOSSARY

1994 Act	American Indian Trust Fund Management Reform Act of 1994, 108 Stat. 4239
APA	Administrative Procedure Act
BIA	Bureau of Indian Affairs
DOI	Department of the Interior
HLIP	High Level Implementation Plan
IIM Accounts	Individual Indian Money Accounts
JA	Joint Appendix
OHTA	Office of Historical Trust Accounting
OIRM	Office of Information Resources Management
PB	Brief on appeal filed by Plaintiffs-Appellees
TAAMS	Trust Asset and Accounting Management System

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INTRODUCTION AND SUMMARY

I. In its previous decision, this Court determined that the government had unreasonably delayed in providing plaintiffs with an accounting. The Court then remanded the case so that DOI could exercise sound discretion in determining how to proceed with the accounting. The Court made clear that future judicial action might be appropriate if the government's implementation of an accounting were so defective as to itself constitute further unreasonable delay. It also made clear that the district court had no general jurisdiction beyond that role, and stressed that the enforceable duty at issue in this case is not to undertake trust reform

pursuant to undefined standards of review, but to render the accounting.

The district court's actions on remand have not conformed to this Court's mandate and governing law. Although plaintiffs seek to dilute the significance of its holding, the district court has held that the Secretary of the Interior is unfit to perform her responsibilities; that the court instead will assume responsibility for determining how an accounting will be rendered; that the court will assume responsibility for trust fund management generally; and that the Secretary should resign if she finds these terms problematic. As plaintiffs do not dispute, the government runs the risk of further contempt sanctions if the court believes that Interior has deviated from the court's understanding of the parameters and procedures it has put in place.

These orders exceeded the district court's authority and, in any event, could not be based on the contempt proceeding conducted by the court. As plaintiffs recognize, only one of the contempt specifications concerned an asserted failure to initiate an accounting. PB 8. The court did not find that the agency acted contemptuously with respect to this specification, and plaintiffs devote only one paragraph of their brief to that specification. PB 41. As discussed in our opening brief, even the evidence submitted within the framework of the contempt trial shows not only that the agency had initiated an accounting but that it has made significant

progress. Indeed, as the Court Monitor recognized, within less than a year from the time of this Court's ruling - and the beginning of Secretary Norton's tenure in office - the government had "made more progress * * * than the past administration did in six years." JA 3161 (Fifth Report of Court Monitor).

The court's error is plain, and the impact of its ruling is significant and immediate. Review at this time is necessary to allow the executive branch to perform the duties committed to it by statute. As plaintiffs observe, the government has submitted a comprehensive plan for an accounting to the district court. That plan is, of course, subject to the limited judicial review described by this Court's remand order. But the Court should make clear at this time that such review extends no further than that established by its previous decision.

II. Although the subject of the trial proceedings was contempt and the trial resulted in a stigmatizing contempt order, plaintiffs make absolutely no effort to defend the contempt ruling. They do not argue that any government action violated any court order and make no attempt to show that any conduct could properly be regarded as contemptuous. The holding of contempt is thus undefended, without foundation, and must be reversed.

Plaintiffs' attempt to demonstrate fraud on the court is doubly flawed. First, they fail to come to grips with governing legal standards and make no serious effort to explain how

publishing a Federal Register notice or "accentuat[ing] the positive aspects" of the DOI computer system, JA 393, could constitute fraud. Second, as discussed in more detail below, the record demonstrates that, far from committing "fraud," the government acted properly throughout.

III. As we showed in our opening brief, the court fundamentally erred in appointing Mr. Kieffer, an individual with vast ex parte contacts in this litigation, to a judicial role as Special Master. Plaintiffs offer no plausible basis to defend the court's appointment. They suggest that the Master-Monitor's ex parte contacts should be disregarded because they took place with the consent of the parties. But it is one thing for an investigator to engage in free-wheeling discussions and document examination with the parties' consent in order to make reports. It is quite another for the same person to then assume a judicial role in the very controversy he investigated. Nor do plaintiffs argue that Mr. Kieffer could be reappointed as Monitor without the government's consent. The need for recusal is manifest and we urge the Court to direct that recusal at the earliest possible time.

ARGUMENT

I. THE DISTRICT COURT EXCEEDED ITS AUTHORITY BY DECLARING THE SECRETARY OF THE INTERIOR "UNFIT" TO PERFORM HER DUTIES AND FORMALIZING A PROCESS BY WHICH THE COURT WILL DICTATE "TRUST REFORM" AND THE DETAILS OF AN ACCOUNTING FOR IIM TRUST FUNDS.

Plaintiffs offer two principal justifications for the relief ordered by the district court. First, they urge that the court has only imposed deadlines "designed to accelerate agency action," PB 62, and that this is the type of relief that a court may order when an agency unlawfully withholds or unreasonably delays action. Second, they argue that a lack of "meaningful trust reform," PB 63, provides an adequate factual predicate for such relief.

Plaintiffs are wrong on both counts. Had the district court simply ordered DOI to meet a schedule in rendering the statutory accounting, the issue presented by its ruling would be altogether different. Such relief would itself be extraordinary, but it in no sense approximates the extent to which the district court has assumed control over all aspects of Indian trust fund management. Moreover, as discussed in our opening brief and below, the contempt trial proceeding furnished no basis for any new order directing performance of the agency's functions.

A. The District Court, Wielding Its Contempt Power, Has Improperly Assumed Responsibility For Implementing An Accounting and "Trust Reform" Generally.

1. To understand the extent of the court's error, it is necessary to stress again what this case is, and is not, about.

Plaintiffs brought an action to compel an accounting. Applying APA standards, this Court concluded that the government had unreasonably delayed in performing that duty. It did not, however, suggest that current - much less future - DOI officials could not be trusted to comply with its mandate. To the contrary, in language that plaintiffs largely ignore, the Court stressed that DOI "should be afforded sufficient discretion in determining the precise route they take," Cobell v. Norton, 240 F.3d 1081, 1106 (D.C. Cir. 1999), and warned that the district court must be "mindful of the limits of its jurisdiction," id. at 1109-10. As discussed in our opening brief (at 29-30), that is consistent with the role of the judiciary in reviewing the manner in which a coordinate branch of government fulfills its statutory responsibilities and with a court's role in considering whether agency action has been unreasonably delayed.

This Court made clear that the judiciary's authority to require an accounting did not authorize it to issue directives with respect to trust management generally, even though various aspects of trust management, such as the hiring of staff and the use of technology, might be related to the performance of an accounting. Accordingly, the Court expressly directed the district court to amend its opinion on remand to account for the fact that the "actual legal breach is the failure to provide an accounting, not

[the] failure to take the discrete individual steps that would facilitate an accounting." Id. at 1106.

2. As plaintiffs do not dispute, the district court did not amend its opinion. Indeed, the court adhered to neither the letter nor the spirit of the remand order. Far from affording the agency sufficient discretion to implement an accounting, the court, wielding the threat of contempt, sought to alter agency decisions fundamental to its accounting plan before their propriety had even been reviewed.

For example, as discussed in more detail in Section II, both Secretary Babbitt and Secretary Norton believed that an accounting methodology should make some use of statistical sampling to make an economically feasible accounting possible in a reasonable time frame. As this Court specifically observed, the propriety of sampling is "properly left in the hands of" the agency. 240 F.3d at 1104.

However, as discussed in our opening brief (at 36-37), and as plaintiffs do not dispute, the court dramatically called into question the Secretary's authority to develop a sampling methodology. Indeed, in a status conference just a day after plaintiffs filed a motion to show cause why defendants should not be held in contempt, JA 4063, the district court announced not only that Secretary Babbitt's decision to employ statistical sampling violated its prior order but that Secretary Norton's endorsement of

that decision was also an "absolute violation of my order" and "was so clearly contemptuous, I don't understand what it is that we are going to try." JA 4074 (10/30/01 Status Conf.). The court reiterated this view during the contempt trial itself, reminding Secretary Norton during her testimony that "I had said from the bench that I thought your signature on that document was clearly contemptuous." See JA 5566 (2/13/02 Trial Tr.).

Plaintiffs do not suggest that Interior acted unreasonably in believing that the district court had cast a cloud over this crucial part of its plan and they do not dispute that officials would have been able to proceed with a sampling methodology only at personal risk. Any such assertion would be implausible. The district court has wielded the threat of contempt and other sanctions throughout this litigation in extraordinary fashion. As of the filing of this brief, the district court has held three Cabinet Secretaries and two Assistant Secretaries in contempt. The court has referred to the Special Master contempt proceedings against 37 non-party employees and counsel. JA 273.

Following initiation of those contempt proceedings, this case was transferred from the Environment and Natural Resources Division of the Justice Department to the Civil Division. See JA 4058 (substituting counsel). More recently, the district court has referred members of the Civil Division trial team, including line attorneys, supervisors, and the Assistant Attorney General, to a

disciplinary panel for an asserted ethical violation in sending out final statements of account to certain class members. See JA 7157. The court subsequently imposed personal monetary sanctions on the Assistant Attorney General and some of the same attorneys for invoking the attorney-client privilege. See JA 7357.[1] On March 5, 2003, the court again imposed monetary sanctions on the Assistant Attorney General and some of the same attorneys for seeking a protective order that would have protected the government from "discovery propounded by the Special Master-Monitor" and would have prevented him "from implementing a rule he has announced that would enable him [to] make dispositive substantive rulings at depositions and to compel witnesses, under threat of potential disciplinary action against their counsel, to answer questions over the objections and instruction of their counsel." JA 7415. See also id. at 7425 (quoting Special Master-Monitor letter).

3. The court's use of the Special Master-Monitor underscores the extent to which the court believes it is, in effect, implementing an injunction requiring general overhaul of trust fund management. Even before its September 17, 2002 contempt ruling, the court had believed it appropriate for the Master and the Monitor to file reports on all aspects of trust management and to seek action based on those reports. See, e.g., JA 4296 (Report of

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[1] The questions concerned attorney-client communications in connection with asserted misrepresentations as to the availability of a deposition witness at a particular time. Id.

Special Master Balaran on IT security, recommending that DOI's Internet access be terminated); JA 3276 (Seventh Report of Court Monitor, recommending that DOI be stripped of trust duties).

The court's March 5 ruling highlights the view underlying the September 17, 2002 order that the judicial role is not to review agency action but to implement a remedy for "the breaches of trust declared by the Court" in 1999. JA 513-14. Declaring again that this is an "institutional reform case," JA 7422, the court held that the Special Master-Monitor, acting as an arm of the court, can request any information regarding trust fund management that he deems proper and, moreover, that he can do so without regard to any applicable privilege. Id. at 7419-21. As authority, the court cited cases involving the implementation of final injunctions or consent decrees in cases involving reform of prisons, schools and other institutions. Id. at 7418, 7422.

The district court thus fundamentally misconceives the nature of its role in this litigation. The court is not implementing an injunction and is not empowered to oversee the details of the government's management of the Indian trust fund program and to enforce its views with repeated imposition and threats of contempt sanctions. This Court, applying APA standards, concluded that DOI had unreasonably delayed in rendering an accounting. That is not a license for a district court to assume control of the process leading to the issuance of account statements, much less to take

responsibility for "institutional reform." As the cases cited in our opening brief (at 30-31) make clear, what a court may do in unusual cases of delayed action is to impose deadlines and require progress reports. See, e.g., In re United Mine Workers of America, 190 F.3d 545 (D.C. Cir. 1999) (requiring progress reports where agency failed to meet congressional deadline and submitted inadequate schedule). Plaintiffs are wrong when they suggest that the court may effectively place the agency into receivership. See PB 60 (citing Dixon v. Barry, 967 F. Supp. 535 (D.D.C. 1997)). See generally Lujan v. National Wildlife Federation, 497 U.S. 871, 891-94 (1990) (role of the judiciary is to address discrete agency action rather than wholesale programmatic improvement).

4. Plaintiffs' suggestion that the court has merely issued an order "designed to accelerate agency action," PB 62, ignores reality and cannot be reconciled with the terms of the contempt order. Although the court asserted that it was not formally appointing a receiver, it effectively appointed itself - with the assistance of the Special Master and the Special Master-Monitor - to the same role. The court made plain that it would not simply set deadlines for an accounting, that it would not remand to the agency, and that it would extend its oversight to trust reform generally. Thus, the court required the filing of two plans, one "for conducting a historical accounting of the IIM trust accounts," and the second plan "for bringing [the defendants] into compliance

with the fiduciary obligations that they owe to the IIM trust beneficiaries." JA 517.

The Secretary has submitted these plans. But plaintiffs do not argue that the Secretary is now free to implement either of them. The court is independently gathering information to pursue "institutional reform" and will consider the Secretary's plans together with plaintiffs' plans and any further information it obtains in the "Phase 1.5" trial in devising further relief.

Plaintiffs ask the Court to disregard the district court's declaration that "Secretary Norton and Assistant Secretary McCaleb can now rightfully take their place * * * in the pantheon of unfit trustee-delegates," JA 539, asserting that this statement is merely dicta. PB 56-67. But that conclusion is the basis on which the court has formalized control over both the steps leading to production of account statements and over trust reform generally. Plaintiffs similarly fail to explain away the court's statement that if Interior officials, "including Secretary Norton, feel that as a result of this Court's rulings they are unable or unwilling to perform their duties to the best of their ability, then they should leave the Department forthwith or at least be reassigned so that they do not work on matters relating to the IIM trust." JA 489. The statement is not a gratuitous insult. It is a straightforward directive to a Cabinet Officer to step aside if she is unwilling to

accept the court's declaration of her unfitness and its assumption of her responsibilities.

Plaintiffs are quite right when they say that Secretary Norton and Assistant Secretary McCaleb are not the subject of contempt sanctions in their individual capacities and that the orders cannot properly have any legal impact on them as individuals. As discussed in our opening brief (at 40-41), and as plaintiffs do not dispute, much of the conduct at issue took place before Secretary Norton and Assistant Secretary McCaleb even took office and certainly could not be attributed to them as individuals. As plaintiffs recognize, such evidence could only be relevant to the question of contempt because the order is directed to the Department of Interior as an institution rather than to any individual. At the same time, however, it should be plain that, quite apart from the question of contempt, the court's assumption of agency responsibilities and its suggestion of resignation reflect a wholly improper judgment about the ability of a Cabinet Officer to perform her duties.

Plaintiffs make no attempt to demonstrate how the district court's ruling can be squared with the nature of this case, this Court's mandate, or principles of judicial review of executive branch action. The court has no general authority to direct trust operations; it has no authority to threaten Cabinet members with contempt when they select accounting methods; and it is for the

President, not a court, to evaluate a Cabinet member's fitness and to suggest that she might consider resignation.

B. <u>The Court's Ruling is Without Factual Predicate</u>.

The district court's ruling would thus be indefensible even if it had been based on a proceeding directed to the question of whether the agency's actions following this Court's ruling were so defective as to constitute further unreasonable delay. However, as plaintiffs are at pains to emphasize, the trial proceeding was "from beginning to end * * * a civil contempt case," and "[o]nly one of the five counts of contempt that were before the district court" even concerned the asserted failure to initiate an accounting. PB 8.

The district court did not find the government's conduct with respect to this specification contemptuous, and plaintiffs devote only one paragraph of their brief to this specification. PB 41. Nor do plaintiffs challenge the evidence noted in our opening brief (at 19-20, 39), demonstrating that DOI has taken significant steps toward producing statements of account for individual IIM account holders. As we discuss at Section II below, even the evidence that the government was able to introduce within the framework of a contempt trial demonstrates significant progress. In light of the evidence discussed in our opening brief, plaintiffs' claim that "Trustee-Delegates do not argue or cite to evidence showing any progress during the last three years," PB 64, is unfathomable.

Like the district court, plaintiffs make no attempt to specify how DOI's actions on remand have been "so defective that they would necessarily delay rather than accelerate the ultimate provision of an adequate accounting." 240 F.3d at 1110. Instead, they offer broad assertions that DOI has failed to implement "meaningful trust reform," PB 60, has "been unwilling to implement trust reforms," PB 58, and has "reneged on their reform commitments," PB 59. Were plaintiffs to explain what they mean by these statements, they would inevitably disclose the extent to which their allegations have little to do with producing account statements for individual IIM account holders and much to do with their view, accepted by the district court, that every aspect of trust fund management should be subject to judicial oversight and control.[2]

Ultimately, plaintiffs' argument is that this Court should refrain from examining the district court's assumption of responsibilities on the ground that appellate review now would be premature. As discussed in our opening brief and at Point IV, infra, plaintiffs are wrong as a jurisdictional matter. And the need for appellate resolution is urgent. The court is currently overseeing DOI as if it were administering a final decree in institutional reform litigation. As explained in more detail below, the extraordinary and improper level of judicial intrusion

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[2] Indeed, plaintiffs' proposed "Compliance Action Plan," filed on January 6, 2003, makes clear that they are seeking wholesale restructuring of DOI and a wide range of programmatic changes. See JA 7229.

and the demands of this all-encompassing litigation are overshadowing the performance of the accounting that the Secretary, as the politically accountable official, has consistently sought to achieve.

Action by this Court is required to ensure that this case proceeds in accordance with its remand order and governing law. The Court should make clear that the judicially enforceable duty at issue is the production of account statements to individual IIM account holders, that the agency may implement the plan that it has already presented to the district court, and that further judicial review, prior to final agency action, must be limited to determining whether that plan or subsequent plans are so defective as to constitute unreasonable delay. See 240 F.3d at 1110 (further role for the court "may well be beyond" its jurisdiction).

II. THE DISTRICT COURT COMMITTED CLEAR ERROR IN HOLDING THE SECRETARY OF THE INTERIOR AND AN ASSISTANT SECRETARY IN CONTEMPT.

A. Plaintiffs Do Not Defend The Finding Of Contempt.

As we have shown, the district court had no power to declare a Cabinet Secretary "unfit" and to assume her responsibilities. But even if the relief ordered were within the contempt power, the proceedings below provided no basis for any form of contempt sanction.

Remarkably, although contempt was "from beginning to end" the subject of the trial, PB 8, plaintiffs make no attempt to show that

the conduct identified by the district court constituted contempt. Nor could they. As discussed in our opening brief, a finding of civil contempt is warranted only where "clear and convincing" evidence exists to prove that a party has violated a "clear and unambiguous" court order, Armstrong v. Executive Office of the President, 1 F.3d 1274, 1289 (D.C. Cir. 1993), and, as we showed, no such violations occurred. Plaintiffs make no attempt to respond to that showing. Indeed, they make no attempt to identify any action by the government that violated any order. Instead, the section defending the district court's ruling is devoted entirely to showing that "Fraud on the Court and Litigation Misconduct Occurred." PB 40.

As we demonstrated in our opening brief, and as discussed below, the government committed neither fraud on the court nor litigation misconduct. But it is clear at the outset that the court's stigmatizing conclusion that the government was in contempt is baseless, undefended, and must be reversed.

B. Plaintiffs Make No Effort To Apply Standards For Determining Fraud On the Court.

Although plaintiffs do not defend the order of contempt, they apparently believe that "fraud on the court" involves a less stringent inquiry. That is not the case. Fraud on the court is a doctrine applicable only to "very unusual cases." 11 Charles A. Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2870, at 415-20 (2d ed. 1995). To constitute fraud on

the court, conduct must "seriously affect[] the integrity of the normal process of adjudication," Gleason v. Jandrucko, 860 F.2d 556, 559 (2d Cir. 1988) (emphasis added), and must actually be meant to influence substantive legal decisions made by a court. See Baltia Air Lines, Inc. v. Transaction Mgmt., Inc., 98 F.3d 640, 642-43 (D.C. Cir. 1996) (finding of fraud on the court is inappropriate where misrepresentations failed to alter the court's rulings); Auode v. Mobil Oil Corp., 892 F.2d 1115, 1118 (1st Cir. 1989) (fraud on the court occurs where "a party has sentiently set in motion some unconscionable scheme" to mislead the court).

As discussed below and in our opening brief, the government provided the district court with extraordinary amounts of detailed information regarding matters that are outside the court's jurisdiction. It did not mislead the court in any material respect, let alone do so intentionally. And plaintiffs do not even attempt to show that any assertedly misleading action by the government actually altered any court ruling. Finally, plaintiffs properly do not argue that a standardless determination of "litigation misconduct" could support the district court's order if, as is clear, the court erred in concluding that the government had committed a fraud on the court.

C. The Record Demonstrates That The Government Acted Properly.

The record demonstrates not only that the government acted properly but that the district court's proceedings impaired progress toward the rendering of an accounting.

1. Specifications 1 & 2.

Specifications 1 and 2 concern the asserted failure to "initiate a Historical Accounting Project," and the asserted concealment of "the Department's true actions regarding the Historical Accounting Project during the period from March 2000, until January 2001." JA 290-91.

a. Plaintiffs make no attempt to explain how the district court could conceivably have concluded that DOI had failed to take steps to initiate an accounting project, and make no response to the evidence cited in our opening brief, perhaps believing that no defense is necessary because the district court did not impose contempt sanctions with respect to this specification. Plaintiffs devote one paragraph of their brief to this specification. PB 41.

Instead, plaintiffs argue that the Federal Register notice published in April 2000 was a "sham" and therefore constituted a fraud on the court. Their argument, in a nutshell, is that the government "conducted an administrative process without ever intending to weigh public comments in general, and not on the accounting method selected. The pretense of conducting a valid

administrative process when they had no intention of doing so is the 'gross misbehavior.'" PB 43 (citing JA 394).

Even assuming plaintiffs' account of events were accurate, this argument is difficult to understand. Agencies routinely propose a specific course of action for public comment and are not required to provide any alternatives. The reasonableness of an agency's action on later review is determined by the extent to which it addresses relevant factors and is not based on a subjective analysis of the decisionmaker's frame of mind. See Texas Mun. Power Agency v. EPA, 89 F.3d 858, 876 (D.C. Cir. 1996) ("The failure to respond to comments is significant only insofar as it demonstrates that the agency's decision was not based on a consideration of the relevant factors") (citation omitted); see also Morgan v. United States, 304 U.S. 1, 18 (1938) ("it [is] not the function of the court to probe the mental processes of the Secretary in reaching his conclusions if he gave the hearing that the law required"). If an agency's failure to consider comments casts doubt on the reasonableness of its actions, the proper course is to remand to the agency to deal with the factors that it has overlooked. Failure to fully consider or address comments has never been thought to be "gross misbehavior."[3]

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[3] Although plaintiffs quote the district court's suggestion that the Federal Register notice constituted a fraud on this Court, PB 42 n.18, they make no attempt to defend that proposition. That the government twice cited the notice in its prior appeal - noting that an accounting effort "has recently been initiated," Br. at 17, 60 - could not conceivably be regarded as fraud of any kind.

b. In any case, plaintiffs' selective recounting of events cannot withstand scrutiny. It is plain that the Federal Register notice reflected a clear and responsible statement of the agency's thinking as it undertook to comply with the district court's ruling. It is also clear that plaintiffs and the district court fundamentally misunderstood the proper role of statistical sampling in the agency's development of an accounting plan.

i. The government provided the district court with the proposed Federal Register notice on March 1, 2000. On April 3, 2000, after receiving court approval, DOI published the notice. See JA 3787 (65 Fed. Reg. 17525 (April 3, 2000)).

The notice recognized the duty to perform an accounting and noted possible approaches, including a transaction-by-transaction reconciliation, statistical sampling, and some combination of these approaches. Id. at 3797-98. DOI explained that a transaction-by-transaction reconciliation for all transactions in all accounts would take many years and cost "hundreds of millions or more." Id. Accordingly, the agency cautioned that:

> Given the enormous scope and costs of an account-by-account, transaction-by-transaction reconstruction, it is unlikely to expect that the Congress would provide the Department with the staggering appropriations needed to fund such a process.

Id. at 3798. The notice stated that it might be "useful to mix a sampling approach with a more precise transactional analysis based on the general criteria of the likelihood of loss." Id. at 3798.

Interior went to great lengths to obtain input: it scheduled eighty-six public meetings nationwide, and solicited written comments until June 30, 2000. The majority of the meeting attendees and just over half of the 153 written comments indicated that beneficiaries desired a transaction-by-transaction accounting, despite the clear notice that such an accounting was unlikely. See JA 3820-21 (Gover Memo). This preference - the only clear trend apparent from public comments - was well known to Interior even before the Federal Register notice was filed, as the district court clearly understood. See JA 321 (DOI knew beneficiaries' preference "even before publishing the notice").

Two months after the comment period ended, DOI decided to proceed with statistical sampling in a meeting in August 2000. See JA 317-18. Every witness at the contempt trial agreed that the August meeting was the first time that this decision was made, including plaintiffs' witness, Deputy Special Trustee Thomas Thompson, who testified that "I don't have any evidence that there was a predetermined result [for statistical sampling] or outcome." JA 4560. As Interior's Deputy Assistant Secretary for Budget and Finance, Bob Lamb, testified, far from being a sham, the notice offered a "potential bonanza for accounting firms and management firms * * *." JA 5136.

When then-Secretary Babbitt officially approved some form of statistical sampling on December 29, 2000, he based his decision on

memoranda submitted by Assistant Secretary Kevin Gover and Special Trustee Thomas Slonaker that clearly explained the budgetary constraints that compelled that approach. See JA 3821-22 (accounting "must be done within the limits of funds made available by Congress," and "transaction-by-transaction accounting * * * would cost hundreds of millions of dollars and take many years to complete"). Like these memoranda, Secretary Babbitt's memorandum pointed out that Congress, in appropriating only ten million dollars for trust account reconciliation, had "agreed that some form of sampling is the most effective approach to provide an accounting for IIM beneficiaries." JA 3815.

ii. Secretary Babbitt left office soon after reaching this decision. Shortly after taking office, before even assembling a full staff, Secretary Norton issued a memorandum adopting Secretary Babbitt's decision that some sort of sampling should be pursued in fulfilling "the court's directive to provide the IIM trust beneficiaries an accounting." JA 3823. In her trial testimony, Secretary Norton explained that she viewed this statement "as pushing the Department into doing something as opposed to the other alternative, which would have been to put things on hold and wait for my new leadership to come in." JA 5566.[4]

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[4] Plaintiffs suggest that a February 23, 2001 memo from Dominic Nessi to the Special Trustee, JA 2043, signified a breakdown in trust management. The memorandum addressed problems in "trust reform," noting that earlier milestones set by the High Level Implementation Plan had saddled the agency with "unrealistic

On July 10, 2001, the Secretary took significant action to advance the accounting process and to ensure that any use of statistical sampling would be consistent with the duty to perform an adequate accounting. Secretary Norton announced the creation of the Office of Historical Trust Accounting (OHTA), which she charged with producing a timetable for the completion of all the steps necessary to develop a comprehensive plan for historical accounting. JA 4000-01. The Secretary explained that

> Through this comprehensive plan, the Department will analyze all options, not just statistical sampling, so that we can demonstrate to Congress, the Court, IIM beneficiaries and the public that we have identified the most cost-effective plan to complete the historical accounting and thereby satisfy the Department's fiduciary duty.

Id.

OHTA commenced work immediately. On September 10, 2001, just sixty days after it was created, OHTA issued a "Blueprint for Developing the Comprehensive Historical Accounting Plan." JA 4002. The Blueprint scheduled plan production for mid-2002, identified the subjects to be addressed, and specified areas for additional

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expectations." Id. Thus, "[i]nstead of 'kudos' to the good efforts of people, all we see is recrimination for missing an arbitrary milestone." Id. As the memo noted, "[t]rust has been neglected for decades in DOI. It cannot be corrected in a couple years." Id. The memo further observed that, "[t]he ongoing series of litigations and harassing activities by plaintiffs' counsel are causing serious morale problems on everyone involved in trust reform. The result is that it clearly takes away from a team effort as people start pointing fingers, hoping not to be the next target of harassment." Id. The memorandum, which issued shortly after Secretary Norton took office, does not, of course, reflect the accomplishments of the next several months, discussed infra.

expert assistance. JA 4014. The Blueprint also identified OHTA's permanent staff and announced its acquisition of over $17 million in funding.

Two months later, OHTA issued another report, in which it described three categories of work that could begin - or had already begun - even before the comprehensive plan was to be completed in 2002. JA 4079. These projects included: 1) Prototype Historical Accounting Projects, in which detailed accountings of some IIM accounts would be performed using different methods to inform OHTA regarding the merits of those methods; 2) Operational Pilot Projects, designed to facilitate the historical accounting by identifying IIM records and verifying the accuracy of existing data and records; and 3) Outreach Projects, to ensure that OHTA's work was open and transparent to affected parties. See JA 1472-73 (Eighth Quarterly Report). To assist in these projects, OHTA hired five public accounting firms, an economics/statistics consultant, an oil and gas consultant, and an integration contractor. See id.

By October 31, 2001 - approximately ten months from the time Secretary Norton took office and approximately nine months after this Court's decision - the initial steps of the pilot project were completed, reconciling approximately 8,400 judgment accounts aggregating over $30 million. In addition, Arthur Andersen reviewed a number of large IIM trust transactions in excess of $1 million, which comprised a total of over $1.5 billion. JA 1475-76.

Indeed, plaintiffs' first witness effectively acknowledged that an historical accounting had been initiated. See JA 4971-72 (Thompson) (agreeing that reconciliation efforts and pilot projects would form part of the historical accounting). OHTA's accomplishments led even the Court Monitor to acknowledge that it had "made more progress in * * * six months than the past administration did in six years." JA 3161.

To the extent that the district court addressed the creation of OHTA at all, it suggested that it might represent evidence of sanctionable misconduct, reasoning that the Secretary had rejected her predecessor's work and "did not know which method or methods [DOI] was going to use." JA 333. But the creation of OHTA did not abandon the agency's previous efforts; it built on them. Secretary Babbitt had concluded that "some form of sampling" would be used instead of a "transaction-by-transaction historical reconciliation of all IIM accounts." JA 3815 (emphasis added). The question of how to conduct an accurate sampling and the extent to which it should be used in combination with a transaction-by-transaction reconciliation for some accounts were unresolved matters as to which the Secretary properly sought prompt resolution by officials to whom she attempted to provide staffing and resources.

iii. Nevertheless, at the precise point when evidence of progress was becoming manifest, the district court began the

contempt proceedings that have cast a shadow on the agency's ability to perform its responsibilities.

In a status conference just days after plaintiffs filed a motion to show cause why defendants should not be held in contempt, JA 4067, the district court addressed the agency's plan for an accounting. The court declared that the use of statistical sampling would place the government in contempt of court. The court announced to the parties:

> The court monitor reported to me that Secretary Babbitt decided that he would just ignore my order and not do the historical accounting. He would just pick out a statistical sample.
>
> He did this in a decision memo. He never told me about it, but he did it, and then Secretary Norton comes in, and the very first action she took touching this case was a few days after the Court of Appeals affirmed me, she reaffirmed Secretary Babbitt's decision to totally ignore my order and not do the historical accounting, just do the statistical sampling, in absolute violation of my order.
>
> What is there left to try regarding Secretary Norton? Her first [action] <u>was so clearly contemptuous</u>, I don't understand what is that we are going to try.

JA 4074 (10/30/01 Status Conf.) (emphasis added).

This declaration is extraordinary. It mistakenly assumes: (1) that the court had the power to bar the use of statistical sampling without considering the agency's explanation of its efficacy and accuracy; (2) that it had in fact done so; (3) that a "historical accounting" rendered with some use of sampling would not be a "historical accounting;" (4) that the agency had concealed

its belief that some use of statistical sampling would be necessary; and (5) that the district court had never been made aware of Secretary Babbitt's memorandum.

The court was wrong in every respect. First, there is no basis on which it could have held statistical sampling to be impermissible without reviewing relevant law and facts. Second, neither the district court nor this Court had suggested that the agency could not use sampling as part of its historical accounting. Third, there was similarly no basis for believing that statistical sampling, properly used, is something separate and apart from an historical accounting. Fourth, the court should have been aware from at least the time of the Federal Register notice in April 2000 that DOI believed that sampling would likely form a crucial part of an accounting. Fifth, the government filed Secretary Babbitt's December 29, 2000 memo with the court on January 9, 2001. JA 3815.

Although the court was plainly wrong to declare that statistical sampling could not be used as part of a valid historical accounting, the agency could not ignore the court's views that the use of sampling would be "clearly contemptuous." The court's declaration thus cast a cloud on the use of a methodology that the agency had consistently deemed crucial to performance of its duties. Indeed, the court reminded Secretary Norton of its views during the contempt trial itself, noting that "I had said from the bench that I thought your signature on that

document was clearly contemptuous." JA 5566. The court's statements chilled the agency's ability to consider a wholly valid approach, and the Secretary's July 2002 report to Congress thus contains no reference to a statistical sampling option.

The district court has never admitted that its statement from the bench was in error, but its contempt ruling appears to recognize that its previous decisions provide no basis for declaring the use of sampling contemptuous. See JA 459. Thus, DOI's Historical Accounting Plan for Individual Indian Money Accounts, filed January 6, 2003, adopts a combination of transaction-by-transaction reconciliation with sampling - the same general approach that was under review at the time that the court first declared sampling to be contemptuous.[5]

In sum, the record reflects no sham, fraud, or misconduct, but a consistent and open attempt to develop an approach to an accounting that is both accurate and feasible.

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[5] The Plan explains that DOI intends to

> conduct the historical accounting by a combination of (1) transaction-by-transaction reconciliation methods (all transactions in certain account types) (2) reconciling all transactions over a certain dollar threshold and (3) reconciling a statistical sample of lower dollar-value transactions. By using these different methods, Interior believes the IIM account holders will receive their Historical Statements of Account much sooner than if a transaction-by-transaction method for all IIM accounts was used.

JA 7284.

2. Specifications 3 & 4.

Specifications 3 and 4 concern primarily the TAAMS computer system, a new, integrated trust asset management system designed by Interior to replace its outdated and disparate "legacy" systems. At the June 1999 trial, government witnesses explained that Interior was in the early stages of implementing TAAMS, a multi-faceted and enormously complex undertaking. See JA 3673-77.

In its September 17, 2002 ruling, the district court concluded that Interior committed fraud on the court by failing to apprise the court of the "true status" of TAAMS between September 1999 and December 21, 1999, and by submitting false and misleading quarterly reports regarding TAAMS and BIA data cleanup starting in March 2000. JA 469-79.

a. The starting point for the court's analysis was its assessment that, after the trial but before the court's December 1999 ruling, Interior should have told the court that it was already becoming apparent that the TAAMS project was encountering problems with respect to schedule and functionality. As our opening brief explained (at 50), in the period after the trial in the summer of 1999 but prior to the court's December 1999 ruling, DOI officials prepared a short memorandum for the court noting that TAAMS implementation had experienced certain problems and suggesting that some of the TAAMS milestones put forth during trial might have to be revised. The court found that the government's

failure to submit this memorandum to the court was intentional, and on that basis concluded that there had been a fraud on the court. JA 358.

The court's analysis is profoundly mistaken. The memorandum at issue was prepared for submission to the court, and there was no reason for the government to decide not to forward it. Indeed, as noted in our opening brief (at 50), no witness at the contempt trial could posit a reason other than "bureaucratic bungling" for why the report that had been prepared was not provided to the court. Nor does the nature of the memo permit an inference that it was concealed for nefarious reasons. The memorandum, which is two pages long, was limited to technical matters, such as "data conversion" from Interior's legacy systems to TAAMS, and conveyed relatively little information of note. JA 2223-24.

The crucial point is that the court was in no pertinent sense misled regarding TAAMS and no memorandum was required to correct misleading evidence. The evidence at the 1999 trial made clear that the TAAMS project was inherently dynamic in nature, that the projected TAAMS deployment schedules were aggressive ones, and that in such circumstances timetables might have to be extended as implementation problems arose. See Govt. Br. 49-50; see also, e.g., JA 3635-37 (Thompson), 3634 (Orr), 3631-32 (Nessi). Indeed, the district court specifically declined to adopt plaintiffs' request to include Phase I trial testimony as a predicate for the contempt

proceedings, and emphasized that it "understood at the time of the [1999] trial that TAAMS might not work." JA 4462.

Consistent with that understanding and the government's representations, absolutely nothing in the court's December 1999 decision suggested that TAAMS was ready for immediate operation. To the contrary, the court was aware that the government had not yet put in place data management systems possessing the needed capabilities with respect to IIM trust accounting. See JA 3673-77, 3723-35.

b. On March 1, 2000, shortly after the December 1999 ruling, the government filed its First Quarterly Report, including Interior's Revised High Level Implementation Plan (HLIP). Those documents expressly stated that TAAMS schedules would have to be revised and additional steps would be required to achieve the system's intended capabilities.

The Revised HLIP explained that, in light of intervening experience discussed therein, the TAAMS deployment schedule would "not be achieved as originally planned," and that Interior's earlier plan "was overly optimistic given the complexity of the task at hand." JA 621-22; see also JA 715. The Revised HLIP similarly alerted the court to schedule slippages and other significant problems regarding the ongoing BIA data cleanup effort. See, e.g., JA 575 ("it is difficult to estimate a total cost and duration for the entire cleanup effort at this time").

The court nevertheless found the First Quarterly Report and subsequent status reports misleading because they reflected an overly optimistic view of the status of TAAMS. According to the court, while Interior made significant affirmative disclosures, the agency acted improperly because it "ended [its assessment] on a positive note," JA 378, and "accentuated the positive aspects of TAAMS," id. at 393. See also id. at 386 (Interior "portrayed TAAMS in a positive light"), 388 (Interior "provided the Court with a positive assessment of TAAMS"), 394 (same), 401 ("Interior presented a positive picture of TAAMS"). These statements underscore the error of the court's analysis. The reports mandated by the court totaled hundreds of pages in length, addressed numerous technical issues, and necessarily required the exercise of judgment regarding tone and emphasis. Under any accepted meaning of the term, it is not "fraud on the court" for an agency within reason to "accentuate the positive" in such circumstances, as long as the government's submissions do not contain deliberate falsehoods or omissions intended to mislead the court on material points.

Seeking to resuscitate the court's analysis, plaintiffs point to a handful of statements found by the court to be "patently false." PB 48. These efforts serve only to confirm that the approach below cannot be accepted by this Court. For example, the court found that the Revised HLIP was fraudulent because it stated

that TAAMS was "operational" at a site in Billings, Montana. See PB 48; JA 380. As plaintiffs' own description reveals, however, the statement in question referred to a pilot site in Billings. PB 48. The government did not suggest that TAAMS was fully working (a suggestion that could not be squared with other information provided to the court), but merely that TAAMS was undergoing testing at the Billings location. See JA 549-50 (Revised HLIP). Similarly, the court took the government to task for its statement in the First Quarterly Report that systems testing in the fall of 1999 was "successfully conducted." See PB 48. That statement, contained as part of a submission of over 200 pages of documents, indicated that Interior had successfully undertaken systems testing; it did not state that the results of the testing reflected a complete success. See JA 716. Nor did Interior represent that the testing was itself complete. See id.

The court also found misconduct in connection with the additional statement in the First Quarterly Report that "[s]ince the time of trial, it has been determined that deploying TAAMS on first a functional basis rather than a geographic basis is a better approach." JA 383-84 (quoting First Quarterly Report at 13). The court appears to have reasoned that Interior had been deceptive because it did not specify in detail that certain functions were ready for further implementation while others were not. See id. But the point of a "functional" approach in this context is that it

permits a large system to be developed function by function, as each function becomes sufficiently workable.

There is no doubt that implementation of TAAMS fell short of expectations, which were, as the government informed the court, overly optimistic at the outset. But as the court was well aware, failures in the development of a large-scale project of this kind are always a possibility, and the government called problems to the court's attention during the Phase I trial and repeatedly in later filings. The court's findings of misconduct with respect to Specifications 3 and 4 are untenable and must be reversed.

3. Specification 5.

The court held that Interior committed fraud on the court by making false representations regarding its computer security. The court's own findings demonstrate that the opposite is true, and its treatment of this specification reflects the errors underlying its order as a whole.

a. Both DOI and the court were aware of longstanding problems with computer security. In early 2000, Interior proposed to relocate the Office of Information Resources Management (OIRM) from Albuquerque, New Mexico, to Reston, Virginia. When plaintiffs sought a temporary restraining order in connection with the move, DOI noted that its action was designed in part to improve computer security. As the district court found, "[i]n opposing the TRO, the Department acknowledged that there were substantial problems with

the security of the computer systems at the OIRM facility in Albuquerque." JA 431.

In a November 2000 progress report filed after the relocation had occurred, "the Department informed the Court" that, with respect to computer security, "[t]here is still significant work to be done in this regard." Id. at 438. As the court itself recognized, it thus "believed that * * * the computer systems were not yet secure." Id.

In February 2001, Special Master Balaran (accompanied by Interior and Justice Department representatives) visited the OIRM site in Reston. Once again, the district court found that "the Department acknowledged (as it had back in March of 2000) that its computer systems were not entirely secure." Id. at 440.

Subsequently, upon the court's direction, the Special Master conducted an investigation of security issues and "found that the Department of the Interior had known about pervasive IT security deficiencies for more than a decade." Id. at 444. The court emphasized that the underlying problems had been aired in a series of public reports over a period of years. Id. Based on the Special Master's conclusion that the status of IT security was "deplorable" and that corrective actions still needed to be taken, the court ordered Interior in December 2001 to disconnect from the Internet all information technology systems with access to individual Indian trust data. Id. at 447, 449. A subsequent

consent order "provided a mechanism by which Interior would be able to bring its computer systems back online." Id. at 450.

Against this backdrop, the court found that defendants had committed a fraud on the court by representing that "they were in the process of making their computer systems more secure when in reality they were doing virtually nothing." Id. at 480. It then went on to declare a judicially enforceable duty to ensure that all information regarding the IIM trust is properly secured and maintained. Id. at 481-82. The court reiterated the view stated in its December 1999 opinion that "'a fundamental requirement of defendants' responsibilities in rendering an accurate accounting is retaining the documents necessary to reach that end[.]'" Id. at 482.

b. The court thus disregarded the terms of this Court's ruling, reasserting the position taken in its first opinion that DOI had breached an enforceable duty with respect to information security. Notably, beyond observing that security would be necessary to the performance of an accounting, the court made no effort to explain what security problems were, in fact, impairing progress in undertaking an accounting.

In any event, the "fraud" trial could not have been a basis for determining whether and to what extent difficulties with information security were impeding progress in accounting. The issue at trial was not unreasonable delay in information security

as it would pertain to the provision of account statements to individual IIM account holders, but asserted misleading statements.

As the evidence cited above makes clear, the court was repeatedly informed about the problems of IT security. The quotations cited by plaintiffs, PB 52-53, reflect hopes that moving the facility to Reston would be a first step "in getting a handle on and correcting the prevailing IT security problems," PB 52 (quoting 226 F. Supp. 2d at 101), or contain admissions that security problems were still unsolved. In finding fraud and contempt with respect to Specification 5, the district court relied, JA 479, on the same TRO hearing at which "the Department acknowledged that there were substantial problems with the security of the computer systems at the OIRM facility in Albuquerque." JA 431. At the hearing, the court repeatedly stated its dismay at the state of IT security, which government counsel recognized "need[ed] correcting," and was "discouraging." JA 3769. That counsel also expressed the view that, with the move to Virginia, "we're on the verge of correcting this, Your Honor," JA 3770, could be no basis for a finding of fraud on the court or contempt.

Finally, although the extent of progress on IT security was not the subject of the trial and could not be a basis for a finding of fraud, the suggestion that DOI had done "virtually nothing," JA 480, is at odds both with the purpose of the move to Reston and with the district court's own observation that in the wake of the Special Master's visit "several changes had been made." Id. at 441

(noting establishment of 24-hour guard service, perimeter foot patrols, and security camera system).

III. THE COURT PLAINLY ERRED IN DECLINING TO REVOKE THE COURT MONITOR'S APPOINTMENT AND IN ELEVATING THE MONITOR TO SPECIAL MASTER.

As discussed in our opening brief, the government consented to the appointment of Mr. Kieffer as Court Monitor on April 16, 2001, for a period of one year. During that time, he had an office in DOI, had wide-ranging ex parte contacts with DOI employees, and filed a variety of reports. At the conclusion of his appointment, the government refused to consent to Mr. Kieffer's re-appointment without significant restrictions on his mandate. When the court declined to accept these conditions and the government sought to terminate Mr. Kieffer's appointment, the district court elevated him to the role of "Special Master-Monitor," in which he would exercise - and has exercised - the authority of a Master over a host of matters, including discovery disputes, while simultaneously continuing to exercise his authority as Monitor.

As discussed in our opening brief, the court cannot impose on the government, without its consent, a "Monitor" with the powers provided to Mr. Kieffer, and plaintiffs make no response to this point.

Instead, plaintiffs argue that Mr. Kieffer can properly serve as Special Master while retaining Monitor functions as well. But there can be no plausible argument that a person who has had

significant ex parte contacts with the parties in litigation and formed strong opinions about the controversy can then assume a judicial role in that case.

A. Plaintiffs concede, as they must, that "the special master must hold himself to the same high standards applicable to the conduct of judges." PB 67 (quoting Jenkins v. Sterlacci, 849 F.2d 627, 632 (D.C. Cir. 1988)).

Nor do plaintiffs dispute that, in his capacity as Monitor, Mr. Keiffer has enjoyed significant access to Interior employees and documents, and that these conversations and documents are not part of the record in this case. Plaintiffs argue, however, that Mr. Kieffer should not be deemed to have engaged in ex parte contacts because he did so under judicial auspices pursuant to the government's agreement.

Plaintiffs misunderstand the issue. The government does not assert that Mr. Kieffer acted improperly in engaging in ex parte contacts with the parties during the year in which the government consented to his appointment - although that appointment was itself extraordinary under the separation of powers. That does not mean that he may now preside in a judicial capacity. A judge may not sit on a case that he previously investigated in a non-judicial capacity, even if all his knowledge was acquired in an altogether proper fashion. Knowledge of that type, unlike record knowledge acquired in a judicial capacity, is "personal" within the meaning of 28 U.S.C. § 455(b) and requires recusal. Judges are not

disqualified on the basis of knowledge received in judicial proceedings precisely because that knowledge is received as part of the record in an adversarial process.[6]

As the Seventh Circuit explained in a decision plaintiffs do not cite, "personal knowledge" means information derived outside the record and not subject to adversarial testing. See In re: Edgar, 93 F.3d 256 (7th Cir. 1996). Thus, the Seventh Circuit held, a judge who engages in off-the-record discussions with a panel of experts acquires personal knowledge and must be recused. Similarly, Mr. Kieffer, whose off-the-record contacts are expansive, cannot now step into a judicial role. The result is no different than would be the case if the district court had engaged in the same contacts itself or otherwise received ex parte information, and then sought to adjudicate the case. Plaintiffs likewise err in believing that the appearance of impartiality is threatened only when ex parte information is acquired from an "improper" source, in the sense that the information is suspect or wrongly received. PB 71-72. The ex parte contact is "improper" because it is not received as part of the record in an adversarial process. Prosecutors and investigators can properly engage in ex

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[6] Urging similar distinctions, several individuals implicated in the ongoing contempt proceedings initiated by the district court filed motions below, and have now filed mandamus petitions in this Court, seeking the recusal of the Special Master, the Special Master-Monitor, and the district judge. See, e.g., In re: Bruce Babbitt, et al., No. 03-5048 (filed Feb. 19, 2003).

parte contacts. What they cannot do is to then sit as judges on the case without creating an appearance of bias.

Nor do plaintiffs advance their argument by suggesting that the government set a "recusal trap" for Mr. Kieffer. PB 70. The government consented to the one-year appointment of a monitor who would acquire ex parte knowledge. It should have been clear to all that the same individual who acquired personal knowledge could not later serve in a judicial function in the same case and, of course, the government had no reason to suspect that Mr. Kieffer would ever be appointed to such a role.

B. In a footnote, plaintiffs cite cases from two other Circuits holding special masters to a less stringent disqualification standard than judges. PB 67 n.23. As plaintiffs recognize, however, the law in this Circuit is to the contrary.

Plaintiffs' suggestion that the "Monitor is not performing a judicial role," id., is particularly extraordinary in light of Mr. Kieffer's vigorous assertion of judicial power. As the district court observed in its March 5, 2003 ruling denying a protective order, the Master-Monitor has asserted far-reaching authority over the regulation of deposition questioning, termination of questioning, resolution of discovery disputes, and recommendation of sanctions, and the court has now largely affirmed that authority. JA 7425-31. Moreover, as noted in the district court's February 5, 2003 order imposing monetary sanctions for assertions of attorney-client privilege, Mr. Kieffer has played an active

"judicial" role in various depositions. See JA 7369-71 (2003 WL 255968).

The powers wielded in this judicial role are particularly significant because the district court has issued broad orders limiting the scope of the attorney-client and work-product privileges that the government may assert and has indicated that assertions of privilege at odds with the Master's rulings will be subject to sanctions. See JA 7388-89 (2003 WL 255970). As the March 5 order makes clear, if the government disagrees with Mr. Kieffer's ruling at a deposition and instructs a witness not to answer, it faces sanctions if the court agrees with Mr. Kieffer's judgment. Id. at 7429.

The March 5 ruling also makes clear that because Mr. Kieffer is a Special Master, the government is required to provide him with documents he is seeking on his own initiative, whether or not they are subject to privilege. JA 7416-17. See also id. at 7419 (because Mr. Kieffer "is a judicial official whose requests for document do not constitute 'discovery,'" privilege is only relevant to whether the judicial official may later disclose them).

Thus, under the court's rulings, an individual who could not properly become a "judicial official" in the first place, may, as an arm of the court, simultaneously demand documents without respect to privilege in order to inform his view of appropriate relief while presiding over depositions and discovery disputes and recommending contempt sanctions. One cannot serve as an

investigator and then turn judge; nor can one serve as a judge in ongoing litigation while simultaneously reviewing non-record material, much less privileged, non-record material as an overseer.

As discussed above, the government believes that an immediate resolution of all issues presented for review is required. However, with respect to the appointment of Mr. Kieffer in particular, we ask the Court to issue a ruling at the earliest possible time, making it clear that Mr. Kieffer should be removed immediately from his position in this case. The district court's error is clear and its latest ruling makes evident that the judicial role assigned to Mr. Kieffer is one of extraordinary importance and commensurate impact.

IV. THIS COURT HAS JURISDICTION OVER THE DISTRICT COURT'S RULINGS PURSUANT TO 28 U.S.C. § 1292(a), OR, IN THE ALTERNATIVE, UNDER THE ALL WRITS ACT.

The government's opening brief (at 24-27) fully addresses the bases of this Court's jurisdiction. Plaintiffs' jurisdictional argument reflects their mistaken understanding of the nature of the district court's orders. The court has not "merely" held the government in contempt. It has declared a Cabinet Secretary "unfit" and asserted judicial control over all aspects of trust management. Plaintiffs do not and cannot dispute that, if the district court believes the Secretary has taken action outside the parameters and procedures it has established, she runs an imminent risk of further contempt sanctions. The court's ruling is both a mandatory and prohibitory injunction and a modification of its

earlier ruling, which it now plainly regards as the equivalent of an injunction. The order is appealable as a matter of right.

Plaintiffs make no effort whatsoever to show why the types of errors at issue here would not, alternatively, be subject to review pursuant to this Court's mandamus jurisdiction. When a district court departs from settled law and this Court's mandate, with significant and ongoing consequences, mandamus is clearly appropriate. Similarly, an order of civil contempt declaring a Cabinet Secretary unfit and inviting her to resign if she does not accept the terms of the court's ruling is properly subject to mandamus review. Likewise, issues of recusal are commonly reviewed on mandamus and courts will not hesitate to use their mandamus authority to rescind an improper referral to a Special Master. See, e.g., United States v. Microsoft, 147 F.3d 935, 953-56 (D.C. Cir. 1998).

Plaintiffs argue, without explanation, that adequate relief is available after final judgment. Quite apart from the fact that the district court has indicated that, in its view, final judgment may not be appropriate for many years to come, JA 539, the impact of the ruling and the nature of the error warrant immediate review. Indeed, not even plaintiffs appear to believe that review of a recusal issue could properly be postponed until after final judgment. Ultimately, plaintiffs' only argument is that the government has not filed a separate petition for a writ of mandamus. PB 30-31. This Court has not elevated form over

substance and, consistent with the practice of other circuits, has treated an appeal as a petition for mandamus when it determines that no appeal of right exists but that review is appropriate under 28 U.S.C. § 1651. See Ukiah Adventist Hospital v. FTC, 981 F.2d 543, 548 & n.6 (D.C. Cir. 1992), cert. denied, 510 U.S. 825 (1993).

CONCLUSION

For the foregoing reasons and those stated in our opening brief, this Court should vacate the district court's order of September 17, 2002 holding government officials in civil contempt. In vacating the contempt order, we ask that the Court make clear that the judicially enforceable duty at issue is the production of account statements to individual IIM account holders, and that, in accordance with this Court's mandate, further judicial review prior to final agency action should be limited to determining whether the agency's actions to render an accounting are so defective as to constitute unreasonable delay. This Court should also vacate the orders of September 17, 2002 denying the defendants' motion to revoke the appointment of Joseph Kieffer as Court Monitor, and elevating Mr. Kieffer to the position of Special Master-Monitor.

Respectfully submitted,

ROSCOE C. HOWARD, JR.
United States Attorney

MARK E. NAGLE
R. CRAIG LAWRENCE
Assistant U.S. Attorneys
U.S. Attorney's Office
Washington, D.C. 20001

ROBERT D. McCALLUM, JR.
Assistant Attorney General

GREGORY G. KATSAS
Deputy Assistant Attorney General

ROBERT E. KOPP
MARK B. STERN
THOMAS M. BONDY
CHARLES W. SCARBOROUGH
SAMBHAV N. SANKAR
(202) 514-5089
Attorneys, Appellate Staff
Civil Division, Room 9108
Department of Justice
601 D Street, N.W.
Washington, D.C. 20530

MARCH 2003

CERTIFICATE OF COMPLIANCE

Counsel for the Appellants hereby certifies that the foregoing reply brief satisfies the requirements of Fed. R. App. P. 32(a)(7), D.C. Cir. Rule 32(a), and this Court's February 10, 2003 order, which allows the inclusion of 10,750 words, because this brief contains 10,713 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and D.C. Cir. Rule 32(a)(2). In addition, the brief was prepared using Corel Wordperfect 9.0 in 12-point Courier New font.

CHARLES W. SCARBOROUGH
Attorney for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of March, 2003, I caused copies of the foregoing reply brief to be sent to the Court by courier and to be served on the following counsel in the manner specified.

By hand delivery:

The Honorable Royce C. Lamberth
United States District Court
United States Courthouse
Third and Constitution Ave., N.W.
Washington, D.C. 20001

Dennis M. Gingold
1275 Pennsylvania Avenue, N.W.
9th Floor
Washington, D.C. 20004

Herbert L. Fenster
McKenna, Long & Aldridge, LLP
1900 K Street, N.W.
Washington, D.C. 20006

Elliott H. Levitas
G. William Austin
Kilpatrickk Stockton, LLP
607 14th Street, N.W.
Suite 900
Washington, DC 20005-2018

By regular mail:

Keith Harper
Native American Rights Fund
1712 N Street, N.W.
Washington, D.C. 20036-2976

MARK B. STERN
Attorney for Appellants