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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

INTERIOR DEFENDANTS' RESPONSE TO THE NATIONAL CONGRESS OF AMERICAN INDIANS' AMICUS BRIEF

Interior Defendants file this response to the Brief for *Amicus Curiae* National Congress of American Indians ("Amicus Brief"), which the Court authorized to be filed on March 3, 2003. In contrast to Plaintiffs' response to Interior's Fiduciary Obligations Compliance Plan ("Plan") and in contrast to Plaintiffs' own proposed plan, the National Congress of American Indians' ("NCAI") brief illustrates the depth and significance of the issues that Interior must address in implementing trust reform and complying with the American Indian Trust Fund Management Reform Act of 1994 ("1994 Reform Act"). As Interior acknowledges and as its Plan contemplates, trust reform must be accomplished through an organized, thoughtful and inclusive approach. Much of NCAI's brief illustrates the principles that Interior Defendants have embraced in their Plan and in their motion for summary judgment regarding their Plan.

On the other hand, many of NCAI's comments on Interior's Plan appear largely to go to matters beyond the scope of the issues before the Court in this litigation and beyond those that Interior's Plan could properly address. Accordingly, while NCAI's comments and critique may be

appropriate for discussion and consultation between Interior and tribal governments in the broader context of trust asset management reform or other programs, NCAI's brief largely bypasses the specific compliance issues pertaining to the accounting for individual Indian trust funds that Plaintiffs seek in this litigation. For example, in making compliance action recommendations, NCAI goes well beyond the statutory scheme that Congress created in the 1994 Reform Act, proposing, among other things, new layers of bureaucratic oversight and intrusion into the roles and responsibilities that Congress vested in Interior. As NCAI acknowledges, "Congress left the DOI with the discretion to determine what specific policies and procedures it would implement to effectively carry out its trust responsibility . . . . " Amicus Brief at 12. Yet NCAI suggests creation of "a trust management oversight body," id. at 13, of a type only Congress can create.

To the extent that NCAI's points and suggestions are or become relevant in the Phase 1.5 trial proceedings, Interior Defendants will respond more fully at the appropriate time. In this response, however, Interior Defendants offer their general response to arguments made by NCAI.[1]

NCAI's proffered "Five Fundamental Trust Reform Principles" illustrate at least two key issues. First, trust management reform and Interior's compliance with the 1994 Reform Act, even with respect to the IIM trust funds, require consideration of more than IIM trust fund management in isolation. Even in deciding how to comply with the 1994 Reform Act with

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[1] For example, while reserving the right to comment further on the Gillis Declaration if the Court were to consider it at trial, Interior Defendants limit their response to the actual arguments raised directly in NCAI's amicus brief. The opinions expressed in the declaration are more properly the subject of consultation among tribes, Interior, individual Indians, and perhaps Congress.

respect to IIM funds, Interior must consider how its actions will affect other statutory authorities and obligations, Federal policies concerning tribal sovereignty and self-determination, and the Government-to-Government relationship between the Federal Government and Indian Tribes. Second, NCAI's selection and characterization of "fundamental" trust reform principles demonstrates that NCAI's interests - and, accordingly, its critique of Interior's Plan and its compliance proposals - go well beyond the issues that are before the Court in this litigation. The Court should not consider NCAI's proposals to the extent that they do not relate to the accounting. Nor should the Court consider them to the extent that NCAI's complaints are more properly directed to Congress or Interior.

NCAI's first "fundamental trust reform principle"[2] is a matter vested exclusively with Congress and as to which Congress has acted through development of standards in the 1994 Reform Act. It is up to Congress to define judicially-enforceable trust standards, determine the parameters of beneficiaries' right of compensation, if any, if those standards are not met, designate the trustee agency to implement statutory duties, and determine the nature of oversight and review of Interior's trust management activity.[3] NCAI's proposed compliance actions, however, do not appear rooted in the 1994 Reform Act.

NCAI's "trust reform principles" numbered 2 through 5 may be consistent in general terms with many of the existing principles and policies of Interior concerning trust management,

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[2] "**TRUST PRINCIPLE 1:** Indian trust fund management must be governed by clear and enforceable standards, with an express right of compensation for trust mismanagement, and independent review of trust management activity." Amicus Brief at i.

[3] For example, as NCAI recognizes, id. at 12, in the 1994 Reform Act, Congress established the Office of the Special Trustee to oversee the Act's implementation.

the Government-to-Government relationship with tribes, and the allocation of limited budget resources. Yet however important they may be as general principles, some of the issues raised by NCAI with respect to particular "principles" - such as Indian education and programs - have no bearing on Plaintiffs' accounting claims before this Court.

NCAI's brief, nevertheless, provides additional context regarding some matters that are relevant to this litigation. For example, NCAI correctly points out that trust asset management - including the individual trust fund accounting that is at issue in this case - is complex business, something that Plaintiffs have failed to acknowledge. NCAI recognizes, Amicus Brief at 25, that past attempts at "quick fixes" have not succeeded - precisely the point that Interior Defendants have made.[4]

NCAI also is rightly concerned about the effect of Plaintiffs' plan on such critical issues as sovereignty and self-governance, tribal involvement in trust asset management, the intermingled nature of tribal and individual Indian trust assets, and the budget reprogramming implications of creating a new and duplicative bureaucracy dedicated solely to individual Indian trust asset management. In seeking to embrace Plaintiffs' trust principles, however, NCAI fails to acknowledge the inherent flaws in Plaintiffs' plan. For example, NCAI expresses its greatest concern about Plaintiffs' proposed separation of individual and tribal trust management functions under two distinct bureaucracies. Nevertheless, NCAI embraces Plaintiffs' trust principles, failing to recognize that Plaintiffs' interpretation of their proposed trust principles dictates just

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[4] Notably, by asking the Court to "seek further clarification from the Plaintiffs regarding their proposed compliance actions . . . . ," Amicus Brief at 42, NCAI further emphasizes the importance of taking the time to do things correctly, rather than engaging in hasty and ill-considered reforms.

such a separation.

NCAI's critique of Interior's Plan largely raises issues that are outside the scope of this litigation. Some of NCAI's points may be well worth consideration in the context of Interior's broader trust reform efforts rather than in this litigation. However, NCAI's observations do illustrate the importance of tribal input into Interior's decisions, even with respect to IIM account management. The fulfillment of Interior's accounting obligations toward IIM beneficiaries should appropriately take into consideration the Government-to-Government relationship with tribes, respect for tribal laws, sovereignty and self-determination, and the intermingled nature of tribal and individual trust assets.

Significantly, NCAI acknowledges, Amicus Brief at 36, that Interior's Plan has the "*potential*" for squaring with statutory requirements. Interior respectfully submits that its Plan's success depends upon cooperation among Interior, Congress, IIM account-holders, and the tribes. Interior takes responsibility for implementing trust reform, but such cooperation is vital to its efforts.

NCAI suggests that this Court take two steps with respect to Interior's Compliance Plan. First, NCAI asks the Court to require Interior, with the active participation of a team of special masters, to do more planning over the next six months. Amicus Brief at 40. This ignores the fact that Interior's "fixing the system" process is well underway already. NCAI itself acknowledges that Interior's Plan has the potential for success. The Court should therefore allow Interior to carry out that process, not create a team of judicial officers whose active participation in the development of Executive Branch plans and policies would be constitutionally

impermissible.[5]

Second, NCAI asks this Court, Amicus Brief at 40-42, to expand the duties of the Special Master-Monitor to include monitoring activities that are well beyond the Court's jurisdiction, or that Interior has no legal obligation to perform. For example, NCAI wants the Special Master-Monitor to assure the availability of Indian Self-Determination and Education Assistance Act (ISDEEA) programs for assumption by the tribes. Id. at 41. But this case is not about ISDEEA programs. Further, NCAI wants the Special Master-Monitor to monitor Interior's development of judicially-enforceable trust standards. Id. at 40-41. But Congress is the appropriate body to establish judicially-enforceable trust standards. Finally, NCAI wants the Court to suspend the ongoing reorganization of trust functions and have the Special Master-Monitor assure further consultation on the reorganization by Interior with tribes. Id. at 42. NCAI cites no authority, however, that would permit the Court to suspend an internal reorganization of trust functions.

Conclusion

NCAI's amicus brief recognizes the depth and significance of the issues that Interior must address in implementing trust reform. NCAI reminds the Court of tribal implications inherent in Interior's trust reform efforts. In many ways, NCAI's brief echos points made by Interior's Plan. However, several of NCAI's suggestions urge the Court to consider matters that are outside the scope of this litigation and of Interior's Court-ordered Plan, and are beyond the authority of the Court to address.

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[5] In addition, the learning curve that such a group would face could potentially delay the trust reform process.

Dated: March 14, 2003

Respectfully submitted,

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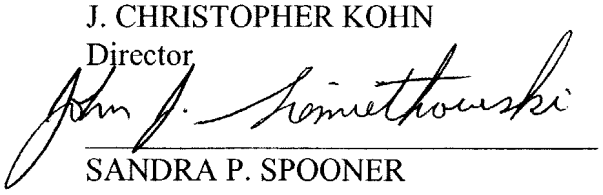

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CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on March 14, 2003 I served the foregoing *Interior Defendants' Response to the National Congress of American Indians' Amicus Brief* by facsimile in accordance with their written request of October 31, 2001 upon:

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