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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

**DEPARTMENT OF THE INTERIOR'S RESPONSE TO THE SEVENTH REPORT OF THE COURT MONITOR**

The Secretary of the Interior ("Secretary") and the Assistant Secretary - Indian Affairs ("Interior Defendants" or "Interior") submit this response to the Seventh Report of the Court Monitor ("Seventh Report" or "Report"), filed May 2, 2002.[1] The Seventh Report states that it addresses "the Court Monitor's review of the progress of trust reform with respect to the Secretary of the Interior's actions regarding the Special Trustee and the Office of Special Trustee since . . . November 14, 2001. . . ." Seventh Report at 1. In fact, the focus of the Seventh Report is not the progress of trust reform, but unsubstantiated theories and opinions of the Court

[1] The ten-day period within which Interior is required to file this Response is not sufficient to respond to the Court Monitor's eighty-six page single-spaced Seventh Report. See April 15, 2002 Order ("The parties shall . . . have 10 days . . . to submit any objections or comments to the report. A party will not be allowed to challenge the Court Monitor's findings if it fails to comment or object to the Court Monitor's report within this 10 day period (unless the Court grants the party an extension of time to file its comments or objections)."). Accordingly, on May 3, 2002, the Interior Defendants filed a motion for enlargement of time to file their Response; it was accompanied by an unopposed motion for expedited consideration. As of the due date for this Response, the Court had not ruled on Interior Defendants' motions.

Monitor regarding the Secretary's management and supervision of officials appointed by the President to assist her in fulfilling her duties.

The Interior Defendants strongly object to the Seventh Report in its entirety and deny all of its substantive allegations. The Report is, in all respects, improper. It violates the constitutional separation of powers doctrine; it exceeds the Court's limited powers under the Administrative Procedure Act; and it exceeds the scope of the authority delegated to the Court Monitor. It makes allegations of misconduct against Interior and Department of Justice ("Justice") officials and employees based upon bald assumptions and a few internal memoranda. Its uncritical adoption of statements made by the Special Trustee and his staff as "fact," and his equally uncritical (and unsubstantiated) rejection of statements made by Interior and Justice officials, is suspect. It improperly publishes privileged documents without affording the Interior Defendants an opportunity to be heard on privilege claims, and refers to government employees in a defamatory manner. The Court should reject the Seventh Report of the Court Monitor in its entirety.

## I. The Seventh Report Is An Attempt By The Court Monitor To Assume Core Executive Branch Functions In Violation Of The Constitutional Separation Of Powers Doctrine.

By publishing the Seventh Report, the Court Monitor steps outside the bounds of constitutional propriety and attempts to assume the mantle of an Executive Branch official. The Seventh Report is devoted to critiquing the Secretary's assessment of the performance of the Special Trustee, defending the Special Trustee against any criticism or concern about his performance, endorsing an expanded role for the Special Trustee, and, without any evidence, ascribing improper conduct and motives to officials who do not subscribe to the Court Monitor's

views regarding the role or performance of the Special Trustee. The Court Monitor has no authority to inquire into the relationship between the Secretary and the Special Trustee, who reports to her. The Court Monitor is not an Executive Branch official charged with management of the Department of the Interior; he is a judicial officer appointed by the Court to monitor Interior's trust reform activities. And even his seemingly broad mandate to monitor "trust reform activities" cannot authorize him to assume functions inconsistent with this Court's jurisdiction, which is circumscribed by the constitutional doctrine of separation of powers as well as the Administrative Procedure Act, 5 U.S.C. §§ 701-706. The Court Monitor's attempt to assume the core executive functions of the Secretary of the Interior by substituting his judgment regarding discretionary policy and personnel matters for that of the Secretary is inconsistent with the Constitution and this Court's jurisdiction.

The separation of powers into three distinct branches of government is inherent in our constitutional framework as "a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." Buckley v. Valeo, 424 U.S. 1, 122 (1976). "The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question." Humphrey's Executor v. United States, 295 U.S. 602, 629 (1935). The Constitution vests in the President the exclusive authority 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). The 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 v. Olson, 487 U.S. 654, 680-81 (1988). Thus, the Supreme Court, while acknowledging that judges, "no less than others in our society, have a natural tendency to believe that their individual solutions to often intractable problems are better and more workable than those of the persons who are actually charged with and trained in the running of the particular institution under examination," has stated unequivocally that "under the Constitution, the first question to be answered is not whose plan is best, but in what branch of the Government is lodged the authority to initially devise the plan." Bell v. Wolfish, 441 U.S. 520, 562 (1979).

Congress entrusted the Secretary of the Interior with the duty to execute the laws governing the individual Indian money ("IIM") trust. 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 "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."). Accordingly, even if the Court Monitor – a judicial appointee acting on the Court's behalf – "believe[s] that [his] individual solutions to often intractable problems are better and more workable than those of the persons who are actually charged with and trained in the running of [Interior]," Bell v. Wolfish, 441 U.S. at 562, it is plainly the Executive Branch in which the authority to supervise and manage trust reform activities is lodged. It is emphatically the

prerogative of the Secretary to decide how best to employ (and evaluate the performance of) the senior executives that have been appointed by the President to help her fulfill her duties.

As explained in the Interior Defendants' Response to the Fifth Report of the Court Monitor, the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, provides the waiver of the United States' sovereign immunity for this action and defines the scope of this Court's jurisdiction. See Cobell v. Norton, 240 F.3d 1081, 1094 (D.C. Cir. 2001) ("Insofar as the plaintiffs seek specific injunctive and declaratory relief – and, in particular, seek the accounting to which they are entitled – the government has waived its sovereign immunity under [Section 702 of the APA]"); Cobell v. Babbitt, 91 F. Supp. 2d at 24 ("Section 702 of the APA waives [defendants'] sovereign immunity for all of plaintiffs' claims that this court will consider."). This Court and the Court of Appeals agreed that Interior Defendants "unreasonably delayed the discharge of their fiduciary obligations," and the Court of Appeals upheld this Court's exercise of jurisdiction under 5 U.S.C. § 706 on that basis. Cobell v. Norton, 240 F.3d at 1097. But both this Court and the Court of Appeals recognized that courts "cannot 'become . . . enmeshed in the minutiae' of agency administration.'" Id. at 1108 (quoting Cobell v. Babbitt, 91 F. Supp. 2d at 54 (D.D.C. 1999), in turn quoting Bell v. Wolfish, 441 U.S. at 562). Rather, "[i]t is proper for a court to allow the government 'the opportunity to cure the breaches of trust declared' by the court." Id. at 1108-09 (quoting Cobell v. Babbitt, 91 F. Supp. 2d at 54). Accordingly, the Court of Appeals presumed that "the district court plans to wait until a proper accounting can be performed, at which point it will assess [defendants'] compliance with their fiduciary obligations," id. at 1110, and cautioned:

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

Id.

In his Seventh Report, the Court Monitor has gone far beyond even extra-jurisdictional "supervision of the Department's conduct in preparing an accounting." The Court authorized the Court Monitor to "*monitor and review*" trust reform activities, not participate in those activities. Yet the Court Monitor opines on the qualifications that Interior officials must possess, the roles Interior officials must be assigned, which officials must manage which projects, which officials' advice the Secretary must accept, and which officials' advice she must reject. The Court Monitor is not conducting himself as an objective observer and reporter of the Interior Defendants' trust reform activities, but rather has sought to become an active agent in the decision-making process.

The Court Monitor simply cannot, consistent with the constitutional role of the Judiciary Branch and the jurisdiction of this Court, participate in the administration of the Department of the Interior in this manner. Personnel management and performance issues in Executive Branch agencies are the exclusive province of the President, his cabinet officers, and Executive Branch officials. Neither the Constitution nor this Court's jurisdiction under the APA permit the Court Monitor to investigate or review such matters, much less substitute (or even recommend the substitution) of his views for those of the Secretary of the Interior. For this reason alone, the Court should reject the Seventh Report of the Court Monitor in its entirety.

## II. The Court Should Not Adopt Any "Finding" or "Conclusion" of the Court Monitor.

In an order dated April 3, 2002, this Court proposed to extend the Court Monitor's service for an additional year and sought comments and objections from the parties. Interior Defendants consented to the appointment only "so long as (1) the Court Monitor's actions and reports are given no greater deference or status [than] those set out in Federal Rule of Civil Procedure 53, (2) his reports are limited to reporting on steps taken by the Department to rectify the breaches of trust declared by the Court or steps taken that 'would necessarily delay rather than accelerate the ultimate provision of an adequate accounting,' Cobell v. Norton, 240 F.3d [at 1110], and (3) his findings of fact submitted to the Court are based upon witness testimony from on-the-record statements given under oath with an opportunity for cross-examination by the parties." Interior Defendants' Response To Court Order Dated April 3, 2002 Regarding Court Monitor at 1-2. Interior Defendants argued that these protections are necessary to ensure the viability of deliberative process and other important privileges, to provide essential regard for the constitutional separation of powers doctrine, and to safeguard the vitally important due process rights of the Interior Defendants and their employees and agents. Id. at 2-5. Interior Defendants pointed out that the use of the Court Monitor's reports in the recent contempt trial demonstrates the importance of having "the factual basis for the Court Monitor's conclusions be unambiguously and clearly identified with a full and fair opportunity for further inquiry and cross examination." Id. at 5.

In an Order dated April 15, 2002, this Court extended the Court Monitor's term of service for one year. April 15, 2002 Order at 2. The court rejected without explanation Interior Defendants' request to limit the scope of the Court Monitor's review. Id. The Court ordered that

"to the extent the Court Monitor's findings of fact submitted to the Court are based upon witness statements, those statements should be developed from on-the-record testimony given under oath with an opportunity for cross-examination by the parties." Id. at 2-3. Finally, the Court ordered that "the Court Monitor's reports shall be given no greater deference than those set out in Federal Rule of Civil Procedure 53." Id. at 3.

The Order re-appointing the Court Monitor authorizes him to "monitor and review all of the Interior [D]efendants' trust reform activities and file written reports of his findings with the Court." April 15, 2002 Order at 2. Accordingly, his authority extends only to preparing reports that describe the status of "trust reform." He is not authorized to make conclusions of law, to hold evidentiary hearings, or to provide advice to the Department of the Interior. The Seventh Report has nothing to do with monitoring the Interior Defendants' progress toward trust reform; rather, it is focused on internal, interpersonal matters well beyond the scope of the Court Monitor's charter and this Court's jurisdiction.

The Court Monitor states that his Seventh Report "is not composed of the examination of witnesses or their oral statements to the Court Monitor." Seventh Report at 82. Rather, "[i]t is based on the written record of their own actions and decisions as composed by each actor in this drama." Id. But the conclusions drawn by the Court Monitor do not follow from any reading of the documents upon which he relies. Rather than citing the documents to substantiate particular factual findings, the Report employs them as a springboard from which to launch the Court Monitor's personal opinions about what the drafters of the documents are "really" thinking or intending.

Reports based upon "'observations and investigations in the absence of a formal hearing' . . . not only transcend[] the powers traditionally given [to Special Masters] by courts of equity, but den[y] the parties due process." Ruiz v. Estelle, 679 F.2d 1115, 1162-63 (5th Cir. 1982), amended in part, vacated in part by 688 F.2d 266 (5th Cir. 1982). Whatever the Court Monitor's role, he cannot be given powers that deny the Interior Defendants due process. Accordingly, any "reports, findings, [or] conclusions" he submits that are not "based on hearings conducted on the record after proper notice" cannot be "accorded any presumption of correctness." Id. at 1163. As nothing in the Seventh Report is based on a hearing conducted on the record after proper notice – indeed the Court Monitor is not authorized to hold evidentiary hearings – nothing in the Report can be accorded a presumption of correctness.

In the absence of evidence, the Seventh Report employs two rhetorical devices to supply the Court Monitor's musings with the pretense of a factual foundation. First, although the Report purports to discuss the actions of the current Administration, it repeatedly ties these actions to a broader narrative of Interior's historical problems with trust management. The Report employs its recital of these historical problems as a substitute for its lack of evidence in support of its conclusions about the current Administration. To cite but one of many examples, after quoting extensively from the Phase I trial testimony of the first Special Trustee, Paul Homan (who resigned in January 1999, two years before the current Administration took office), the Report concludes: "Change the names on the doors and you would have almost the same picture today regarding the relationship between the Special Trustee and the Secretary and her senior management staff including the attorneys within the Solicitor's Office and the DOJ. Nothing has

changed." Seventh Report at 62.[2] It is far from clear that Mr. Homan's testimony establishes, as the Court Monitor suggests, that he was "thwarted in his efforts to bring about trust reform . . . by DOI's and BIA's institutional recalcitrance and intransigence." Id. at 63. But even if his testimony did establish this, the Court Monitor cites no evidence to support such a conclusion about the current Special Trustee. The Report's rhetorical strategy is an attempt, contrary to basic rules of logic, fairness, and evidence, to prove misconduct of the current Defendants by citing past acts of others.

A second rhetorical device the Seventh Report uses to conceal the absence of probative evidence is to present unsubstantiated allegations in the form either of questions or of tautological statements that purport to deny the conclusion being drawn. Thus, for example, the Report alleges that Interior Defendants (and their counsel) have criticized the Special Trustee and Principal Deputy Special Trustee in order to discredit their testimony in the recent contempt trial. But instead of offering evidence to support this allegation, the Report instead offers a series of rhetorical questions: "What weight would the Special Trustee's and his Principal Deputy's contempt trial testimony carry then? The Defendants' [sic] would likely characterize this scenario as unduly conspiratorial. Perhaps it is. But what other reason would the attorneys for the Defendants' [sic] allow the Secretary to challenge the Special Trustee's conduct and honesty in a forum so public that it can only bring further criticism about and mistrust of the Defendants'

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[2] See also Seventh Report at 56 ("'What Is Past Is Prologue' reads an inscription on the National Archives building in Washington, DC. Another found engraved on the building states 'Study The Past.' A perfect example of the situation the present Special Trustee and Secretary of the Interior find themselves in is contained in the history of Mr. Paul Homan's tour of duty as the first Special Trustee . . . ."); Id. at 63 ("The Office of the Special Trustee is involved in its own 'Groundhog Day' with history repeating itself over and over again.").

conduct of trust reform?" Seventh Report at 73. Likewise, the Seventh Report suggests that the Solicitor's Office and the Department of Justice are responsible for any incompleteness or inaccuracy in Interior's responses to the Special Master's reports and document requests and that such responsibility may amount to contemptuous behavior. Instead of offering evidence to support this unfounded allegation, however, the Seventh Report makes the claim in the form of a statement that it is making no such claim: "It is not the goal of this Seventh Report to review the machinations of the DOJ or Solicitor's Office attorneys regarding responses to the Special Master's Reports or document production requests. Nor will this Report comment on who may be in contempt of those requests if they are not complete or accurate. . . . The absence of a formal conclusion is no indication that the DOJ and DOI attorneys have conducted themselves in a manner that should not subject them to this Court's attention. . . ." Id. at 76 & n.22.

Our legal system is based on the principle that evidence must serve as the foundation for judicial action. That is why we have developed over many centuries a series of complex evidentiary rules determining, inter alia, the quantum of evidence required for various type of judgments, the party on which the responsibility for meeting the burden of proof falls, and the particular kinds of evidence that are deemed sufficiently probative and non-prejudicial to provide a reliable foundation for judicial action. These are obvious principles. The Seventh Report's failure to comply with these basic principles – its lack of any evidentiary foundation and its manipulation of rhetoric – demands its rejection.

## III. The Court Should Direct The Court Monitor To Remove Privileged Documents From The Seventh Report Immediately.

Attached to the Seventh Report are six privileged documents, five of which the Interior Defendants produced to the Special Master *in camera* with a privilege log in response to his March 29, 2002 request for "instructions" issued by the Department of the Interior, the Solicitor's Office and the Department of Justice "seeking compliance" with his prior requests for documents relating to IT security, the OIRM move from Albuquerque to Reston, and the records move from Albuquerque to Lee's Summit:

1. March 29, 2002 letter from Sandra P. Spooner, Deputy Director, Department of Justice, to Larry Jensen, Counselor to the Solicitor, Department of the Interior transmitting and discussing recent Special Master requests and attaching certain prior letters from DOJ (produced to Special Master as SMREQ0002156-P through SMREQ0002160-P and as SMREQ0001385-P through SMREQ0001389-P), attached to Seventh Report at Tab 13. The transmittal letter to the Special Master and the relevant portion of the accompanying privilege log are attached at Attachment A.

2. March 25, 2002 letter and revised draft supplemental search memorandum for Special Master's February 7, 2002 request (as clarified on March 8, 2002) regarding the OIRM move from Peter B. Miller, Trial Attorney, Department of Justice, to Larry Jensen, Counselor to the Solicitor, Department of the Interior (produced to Special Master as SMREQ0002167-P through SMREQ0002172-P), attached to Seventh Report at Tab 13. The transmittal letter to the Special Master and the relevant portion of the accompanying privilege log are attached at Attachment B.

3. March 20, 2002 letter from Peter B. Miller, Trial Attorney, Department of Justice, to Larry Jensen, Counselor to the Solicitor, Department of the Interior transmitting and discussing Special Master's March 20, 2002 request regarding IT security (produced to Special Master as SMREQ0002180-P), attached to Seventh Report at Tab 13. The transmittal letter to the Special Master and the relevant portion of the accompanying privilege log are attached at Attachment C.

4. April 12, 2002 memorandum from Thomas Slonaker, Special Trustee, to William Myers, Solicitor, DOI, discussing legal advice received by the Office of the Special Trustee concerning its document production in response to the Special

Masters 3/19/02 request regarding the Lee's Summit records transfer and quoting and transmitting the 3/19/02 letter from the Department of Justice to the Office of the Solicitor transmitting and discussing the Special Master's 3/19/02 request (produced to Special Master as SMREQ0002610-P through SMREQ0002614-P), attached to Seventh Report at Tab 16. The transmittal letter to the Special Master and the relevant portion of the accompanying privilege log are attached at Attachment D.

5. March 19, 2002 letter from Amalia B. Kessler, Trial Attorney, Department of Justice, to Larry Jensen, Counselor to the Solicitor, Department of the Interior transmitting and discussing Special Master's 3/19/02 request regarding Lee's Summit records transfer (produced to Special Master as SMREQ0001357-P through SMREQ0001358-P and as SMREQ0002613-P through SMREQ0002614-P), attached to Seventh Report at Tab 16. The transmittal letter to the Special Master and the relevant portion of the accompanying privilege log are attached at Attachment E.

6. April 24, 2002 memorandum from Thomas Thompson, Principal Deputy Special Trustee, Department of the Interior, to William Myers, Solicitor, Department of the Interior and Larry Jensen, Counselor to the Solicitor, through Tom Slonaker, Special Trustee, Department of the Interior discussing March 29, 2002 letter from Sandra Spooner, Department of Justice, to Larry Jensen, attached to Seventh Report at Tab 12 and Tab 16.

Interior Defendants claimed work product and attorney/client privileges for the documents produced to the Special Master (numbered 1 through 5, above) because they concern the purely litigation-related topic of responding to the Special Master's document requests in Cobell v. Norton rather than the broader issue of Interior's trust obligations. The documents were listed on a privilege log and produced to the Special Master *in camera* on the condition that they not be produced or made public without Interior Defendants first having an opportunity to seek a final ruling on the issue of work product and attorney/client protection. The sixth document has not been produced to the Special Master, but is privileged nonetheless.

The Court Monitor states that he secured these documents "[p]ursuant to this Court's April 16, 2001 Order and the Secretary of the Interior's April 24, 2001 subsequent direction in

light of that Order that the Court Monitor should be provided 'access to any Interior offices or employees to gather information necessary or proper to fulfill his duties.'" Seventh Report at 68. The Court Monitor does not suggest – much less establish – that he obtained a knowing waiver of privilege from anyone authorized to waive the privileges attached to these documents. Nor did the Court Monitor afford the Interior Defendants an opportunity to be heard on any privilege claims it had for these documents before publishing them with his Report. Whether or not the Court's April 16, 2001 Order authorizes the Court Monitor to review privileged documents *in camera*, it certainly does not authorize a breach of the Federal Government's litigation privileges by publishing privileged documents without affording Interior Defendants any opportunity to be heard on privilege claims it has for the documents. And inasmuch as the Interior Defendants had already made a privilege claim for all but one of the documents, clearly marked them as privileged, and produced them for *in camera* review by the Special Master with an accompanying privilege log, the publication of these documents is inexcusable. Interior Defendants respectfully request that the Court direct the Court Monitor to immediately remove from the Seventh Report these privileged documents and all portions of the Report that discuss or disclose the content of these documents.

## IV. Even If The Constitutional, Jurisdictional, and Evidentiary Obstacles To The Court Monitor's Critique Of The Secretary's Working Relationship With The Special Trustee Could Be Overcome, His Criticism Is Wholly Unfounded.

The constitutional, jurisdictional, and evidentiary infirmities of the Seventh Report are more than sufficient to establish that the Seventh Report must be rejected in its entirety. Nothing illustrates more clearly the impropriety of the Seventh Report than its line-by-line attack on a private memorandum from the Secretary addressing performance issues with the Special Trustee.

As explained in Section I, above, such issues cannot be the subject of judicial review. Nonetheless, the Court Monitor (while decrying the publication of the dialogue between the Secretary and Special Trustee by noting that a copy of the Secretary's April 17, 2002 memorandum "found its way to the Lincoln Journal Star," see Seventh Report at 76 n.23), has overstepped his authority and made his critique of the Secretary's management of the Department of the Interior a matter of public record. Thus, Interior Defendants have reluctantly concluded that his criticisms of the Secretary and allegations of misconduct by government employees cannot go unanswered.

### A. Interior Defendants Deny Emphatically The Court Monitor's Allegations Of Intent To Discredit Or Retaliate Against the Office of the Special Trustee Or The Special Trustee Himself.

Without evidence, the Court Monitor repeatedly suggests that the Interior Defendants and their counsel have embarked on a campaign to discredit or retaliate against the Special Trustee, and that they have done so because of his testimony and that of his Principal Deputy at the recent contempt trial.[3] In the process, the Court Monitor makes the extraordinary claim that the

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[3] See, e.g., Seventh Report at 54-55 ("In the words of one OST official commenting on the historical accounting machinations of the last administration, it is 'passing strange' that Mr. Slonaker, who has testified before this Court (as did his Principal Deputy, Thomas Thompson) about just who was responsible for the actions that have brought the Secretary before this Court, would now find himself and his staff under review and criticism by the Secretary and Deputy Secretary."); Id. at 55 n.16 ("This Court has had occasion to caution Defendants against taking adverse personnel actions against their employees for speaking publicly about the problems with DOI's trust reform operations and has taken action where necessary. The Secretary's memorandum can have no other result than a chilling effect upon those OST officials carrying out their Congressionally mandated oversight functions. It, in itself, due to its patently false assertions and misinterpretation of past events, could qualify for such prohibited retaliation."); Id. at 69 ("From a reading of the available documents, it would appear that the hostility towards the Special Trustee for, perhaps, his criticism of the DOJ and Solicitor's Office attorneys' past conduct, his testimony and that of his Principal Deputy at the Secretary's contempt trial and in (continued...)

Secretary's April 17, 2002 memorandum to the Special Trustee evaluating his job performance contained "patently false assertions and misinterpretation of past events." Seventh Report at 55 n.16. The Court Monitor does not indicate which assertions are "patently false," but elsewhere in his Report attempts to raise questions regarding some (but not all) of the concerns about the Special Trustee's performance expressed in the Secretary's memorandum. See id.

The Court Monitor seems to believe that providing testimony at the Secretary's recent contempt trial has permanently immunized the Special Trustee and his Principal Deputy from scrutiny of their performance. But he fails to recognize that the Secretary has the duty to address performance concerns with senior officials in the Department of the Interior, including the Special Trustee. The Secretary attempted to open a dialogue with the Special Trustee regarding her concerns about his performance. The Court Monitor has interrupted and sought to interfere with this dialogue by publicly drawing conclusions about its proper resolution.[4]

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[3](...continued)
[sic] his recent memorandum to the Secretary about the poor status of trust reform (due in part to the litigation-driven decision-making of DOJ and the Solicitor's Office attorneys), has spilled over into an attempt to prejudice this Court regarding the credibility and honesty of the Special Trustee and his key subordinates.); Id. at 73 ("What weight would the Special Trustee's and his Principal Deputy's contempt trial testimony carry then? The Defendants' [sic] would likely characterize this scenario as unduly conspiratorial. Perhaps it is. But what other reason would the attorneys for the Defendants' [sic] allow the Secretary to challenge the Special Trustee's conduct and honesty . . . ?").

[4] The Court Monitor refers repeatedly to "actions" the Secretary has taken with regard to the Special Trustee. But the Secretary's memorandum to the Special Trustee does nothing more than state concerns she has about the Special Trustee's performance, and indicate that she has asked the Deputy Secretary to review with him "the relative performance of OST." Seventh Report at Tab 8. The review is ongoing, as the Secretary indicated in Interior's Status Report to the Court Number Nine. See Status Report To The Court Number Nine at 7 (May 1, 2002).

The Secretary has raised objectively reasonable and legitimate concerns about the performance of the Special Trustee. The Court Monitor's defense of the Special Trustee's performance is based substantially upon – and assumes the accuracy (and evidentiary value) of – previous Court Monitor Reports without any acknowledgment of Interior's responses to those Reports. The Court Monitor also attempts to reopen issues litigated during the contempt trial. The Interior Defendants object to the Court Monitor's commentary on and characterization of trial testimony and other evidence regarding matters before the Court in the contempt trial, which is now under submission. The Court has before it extensive proposed findings and conclusions that analyze the testimony and its import. It is improper for the Court Monitor to now assess the witnesses' testimony and draw inference regarding matters before the Court. To the extent the Court Monitor relies on his previous reports and attempts to reopen issues litigated during the contempt trial, Interior Defendants hereby incorporate by reference their responses to each of the previous Court Monitor Reports and all evidence and other materials (e.g., motions, briefs, proposed findings of fact and conclusions of law) they presented and objections they made during the contempt trial.

Remarkably, the Court Monitor, having decided to make the Special Trustee's performance of his duties a central feature of his Report, refuses to even acknowledge the serious questions raised by the Special Master about the programs under the direct supervision of the Special Trustee and about the qualifications of the Special Trustee and his staff to manage trust operations. In his Second Investigative Report Of The Special Master Regarding The Office Of Trust Records ("Special Master's Second Investigative Report"), filed April 11, 2002, the Special Master sharply criticized the record training program launched by the Office of the Special

Trustee's Office of Trust Records ("OTR"). In a memorandum responding to the Report, the Special Trustee stated that "many of the facts and statements presented in the Special Master's report are irrefutable." Department Of The Interior's Response To The Second Investigative Report Of The Special Master Regarding The Office Of Trust Records at Ex. 2 (April 25, 2002).

In his Emergency Report Of The Special Master Regarding Defendant's [sic] Proposed Relocation Of Records To The Lee's Summit Federal Records Center ("Special Master's Emergency Report"), filed April 17, 2002, the Special Master stated that the Office of the Special Trustee's plan to transfer 32,000 boxes of documents to the Federal Records Center in Lee's Summit, Missouri was "ill-planned, ill-conceived and will almost surely compromise the ability of individual Indian trust beneficiaries to access vital IIM data." Special Master's Emergency Report at 1. Citing "a profound lack of planning and an utter indifference to the safety of these records or to the ability of IIM beneficiaries to have meaningful access to vital information," the Special Master concluded that "the Office of the Special Trustee is uniquely unqualified to handle its trust records responsibilities." Id. at 23. In his memorandum responding to this report, the Special Trustee declined to "comment directly on the Special Master's pointed criticisms of OST in the Emergency Report," but "agree[d] with the Special Master that many of the management and planning actions presented in the Special Master's Emergency Report are essential steps that must be addressed to ensure the transfer is successful." Department Of The Interior's Response To The Emergency Report Of The Special Master Regarding Defendant's Proposed Relocation Of Records To The Lee's Summit Federal Records Center at Ex. 5 (May 1, 2002); see also Seventh Report at 74 (quoting May 1, 2002 memorandum from the Special

Trustee to the Secretary, in which the Special Trustee states "I basically agree with the Special Master's opinion").

Yet in spite of these two reports from the Special Master directly contradicting the Court Monitor's own assessment of the Special Trustee's performance, the Court Monitor states simply – in a footnote – that he "takes no position on the Secretary's reference to the Special Master's concerns found in the two most recent reports filed by the Special Master with this Court as they are still under investigation and outside of the scope of this Report." Seventh Report at 54. But the Special Master has filed two public reports and the Interior Defendants have filed responses to the reports. It is revealing that the Court Monitor considers these serious concerns about the performance of the Special Trustee – concerns that the Special Trustee largely concedes are warranted – "outside the scope" of a Report devoted almost exclusively to questioning and maligning the motives of the Interior Defendants in raising concerns about the Special Trustee's performance.[5]

The first concern of the Secretary addressed by the Court Monitor is her observation that "to the best of my knowledge the only [quarterly] report to have received any positive feedback is the Eighth Report supervised by Ross Swimmer." Seventh Report at 38-39 & Tab 6. Notably, the Court Monitor does not dispute this observation, but nonetheless defends the Special Trustee's supervision of the preparation of earlier quarterly reports by arguing that the responsibility for "preparing" the reports fell upon "the respective Bureaus and project

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[5] Nor does the Court Monitor acknowledge or address the Secretary's concern about "recent financial audit findings that suggest room for improvement (inadequate policies & procedures, unreconciled cash, trust fund and special deposit account balances)." See Seventh Report at Tab 8.

managers," rather than the Special Trustee, and that they prepared "inaccurate, incomplete and untruthful reports." Id. at 39. He credits the Special Trustee's testimony that his role was limited to "accepting [] the subproject reports from the respective subproject managers, doing any editing and formatting that's required, trying to make certain that the reports have some accuracy, that there aren't glaring inaccuracies that we might otherwise question, and then submitting that eventually to the Court."[6] Id. at 39 & n.9. In contrast, the Director of the Office of Indian Trust Transition, who has supervised the preparation of the Eighth and Ninth Reports, assembled a team of people who put in hundreds of man-hours interviewing project and operations managers, reviewing reports, and evaluating responses for accuracy. See April 16, 2002 Declaration of Ross O. Swimmer at ¶¶ 10-14 (Attachment F); see generally Status Report To The Court Number Eight at 15 (Jan. 16, 2002); Status Report To The Court Number Nine at 45-48 (May 1, 2002). The contrast in accountability, management initiative, and end product is notable.

Next the Court Monitor addresses the Secretary's concern about "projects that have been transferred to other organizations without material progress (collection of missing information, historical accounting, etc.)." The Court Monitor defends the Special Trustee by alleging that the Secretary "could not have read or received correct summaries of at least the First Report of the Court Monitor," Seventh Report at 40, and then quoting extensively from his first Report, see id.

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[6] The Court Monitor also asserts with no evidence (except his prior Reports) that the Special Trustee "received little support in [his effort to bring some semblance of transparency to the quarterly reports] and the direct obstruction of not only the BIA but also attorneys within the Office of the Solicitor." Id. at 39. In addition, the Court Monitor comments extensively on the Special Trustee's refusal to verify the Sixth and Seventh Quarterly Reports, see, e.g. id. at 29-33, 39, an issue fully addressed in the recent contempt trial. As noted above, Interior Defendants incorporate by reference their responses to the Court Monitor's previous reports and the evidence and other material they submitted at the contempt trial.

at 40-44. Again, Interior Defendants object to the Court Monitor's improper comments regarding issues litigated in the recent contempt trial while a decision is pending.

Whether or not the Court Monitor believes the Secretary's concern about the historical accounting was justified, her statement that the historical accounting project was transferred to the Office of Historical Trust Accounting without material progress is correct. It is also beyond dispute that Congress has, by statute, directed the Special Trustee to "monitor the reconciliation of tribal and Individual Indian Money trust accounts to ensure that the Bureau provides the account holders[] with a fair and accurate accounting of all trust accounts." 25 U.S.C. § 4043(b)(2)(A). Whatever the merits of various employees' versions of why the historical accounting floundered before the Secretary created the Office of Historical Trust Accounting, the status of the historical accounting project when the Secretary assumed office provided an objectively reasonable basis for concern that the Special Trustee was neither properly "monitor[ing] the reconciliation" nor adequately "ensur[ing] that the Bureau provide[] the account holders[] with a fair and accurate accounting of all trust accounts." Id. If the Office of the Special Trustee opposed certain historical accounting initiatives, it had an obligation to "provide such guidance as necessary to assist Department personnel in identifying . . . options for resolving problems. . . ." 25 U.S.C. § 4043(d).

As for the current historical accounting project managed by the Office of Historical Trust Accounting, the Court Monitor cites the Special Trustee's "first time opinion that a proper historical accounting . . . cannot be performed," Seventh Report at 66, in the April 30, 2002 memorandum from the Special Trustee to the Secretary. Yet, according to the Executive Director of the Office of Historical Trust Accounting, the Special Trustee has never expressed

any such concern to him and, indeed, has never even "inquired as to the status of the [historical accounting] project" since the Office of Historical Accounting was created in July 2001. See Memorandum from Bert T. Edwards, Executive Director, Office of Historical Trust Accounting, to Thomas N. Slonaker, Special Trustee (May 8, 2002) (Attachment G).

With regard to the "collection of missing information," the Court Monitor states that "[i]t is accurate that this project made little or no progress during the period from this Court's December 21, 2002 [sic] decision creating that particular breach project and the transfer of it to the Office of Historical Trust Accounting." Seventh Report at 42. But the Court Monitor, citing his First Report (without acknowledging Interior's response), asserts that "the reasons for that failure have absolutely nothing to do with the Special Trustee's ability or desire to proceed with that project." Id. Instead, the Court Monitor alleges that progress was limited by "the direction of the Solicitor's [O]ffice and their vigorous opposition to OST officials doing anything more than a review of missing information from 1994 forward." Id. at 44.

As an initial matter, as explained in the Interior Defendants' response to the First Report of the Court Monitor (incorporated herein by reference), the Interior Defendants' plan to collect information from outside sources did not impose date limitations. See Department of the Interior's Response To The First Report Of The Court Monitor at 13-15. The plan clearly stated that "[t]he approach for providing information to account holders for the prior period will be determined after the proposed information gathering [announced in the April 2000 Federal Register Notice] with account holders, their representatives, and other interested parties." Report On Collecting Information From Outside Sources at 2, 4, 9 (Feb. 2000) (filed with Notice Of

Filing Of Department Of Interior's First Quarterly Report And Related Documents on March 1, 2000).

However, the Court Monitor misses the point. Even if his allegation that the prior Administration somehow limited the collection of missing information to the period after 1994 were correct, the Office of the Special Trustee's lack of progress in gathering information for the period 1994 through 2001, and unwillingness to be accountable for the missing information project, was cause for concern to this Administration. The Principal Deputy Special Trustee, who was the official responsible for managing the project before it was transferred to the Office of Historical Trust Accounting on October 1, 2001, testified in response to questions by plaintiffs' counsel that the Office of Special Trustee made no effort to contact any private records custodians:

> Q. Mr. Thompson, on or about February 16th, 2000, were the oil companies and mining companies and timber companies and ranchers and others immediately contacted to advise them to retain documents that may be related to this litigation?
>
> A. No.
>
> Q. To your knowledge, have they been at this point in time?
>
> A. They have not been contacted through my efforts, up until the time we turned over the documents to the historical accounting operation in the 1st of October.
>
> * * * *
>
> Q. And, to your knowledge, none of these third parties have been asked to retain their documents?
>
> A. I'm not aware of any effort to notify them, at least through the October time frame.

Testimony of Thomas M. Thompson, Dec. 17, 2001 at 999-1001. Thus, the lack of material progress on the collection of information from outside sources while under the supervision of the Special Trustee is undisputed – and the Secretary's concern about this matter was objectively reasonable – whether or not the Court Monitor's theory about the limitation of the project is correct.

In response to the Secretary's concern regarding "OST funding that was not provided in a timely manner to accommodate important trust initiatives," the Court Monitor states that the Special Trustee "has withheld funds under his statutory obligations to ensure that the appropriate actions were taken on trust reform" and "refused to fund trust reform projects that were not properly planned or where no plans were in existence to support BIA and other Bureaus' funding requests." Seventh Report at 45. However, he declines to opine on whether the Special Trustee exercised this authority appropriately: "It is not the object of this Report to delineate all such instances or whether he was right or wrong to have done so." Id.

Next the Court Monitor attacks the Secretary's statement that, "instead of relatively ambiguous observations," she expected "more robust contributions from OST in identifying concrete solutions or taking actions to improve program accountability" in the aftermath of the EDS review of the status of trust reform. Id. at 45 & Tab 8. The Court Monitor defends the Special Trustee by quoting extensively from his Third and Fourth Reports, but fails to cite any concrete solutions proposed by the Special Trustee or any actions taken to improve program accountability in the aftermath of the EDS Report. Instead, he replays the circumstances surrounding the Special Trustee's failure to verify the Seventh Quarterly Report and his role in its preparation. See id. at 46-52.

The Secretary sent her April 17, 2002 memorandum to the Special Trustee in response to his April 8, 2002 memorandum requesting an expansion of his responsibilities to include "responsibility for completing an action plan to implement trust reform" and "line responsibility for the development and management of the trust systems including but not limited to data cleanup, probate, and policy and procedures." Seventh Report at Tab 6. Among the "keys to successful trust management going forward" the Special Trustee cites in his memorandum are "executive leadership," "accountability," and "project management." Id. Yet the Special Trustee's performance in these areas has not inspired the Secretary's confidence, and the Special Master's recent reports establish that the Secretary is not the only person who has noticed.

The Special Master's sharp critique of the Special Trustee's performance (which the Special Trustee concedes is largely accurate) in two areas in which he currently has line authority is sufficient in itself to warrant the Secretary's reluctance to expand the Special Trustee's line authority to include "the development and management of the trust systems including but not limited to data cleanup, probate, and policy and procedures," Seventh Report at Tab 6, at this time. Under the circumstances, the Secretary had good reason to conclude that it might be a dereliction of her professional obligation not only to the United States generally, but to the IIM trust beneficiaries in particular, to expand the responsibilities of an individual who has not demonstrated that he is managing his current responsibilities in an accountable manner.

The Secretary has raised objectively legitimate and serious concerns about the performance, accountability, and leadership of the Special Trustee, some of which even the Special Trustee does not dispute. These concerns are particularly important in light of the unique position the Special Trustee holds, and his assertions that accountability and leadership are

indispensable hallmarks of trust management. The Court Monitor's suggestion that these concerns have been raised in retaliation for the Special Trustee's testimony at the Secretary's contempt trial is unfounded. The Interior Defendants deny and object to this unfounded allegation.[7]

### B. The Court Monitor's Conclusion That The Secretary Has Unlawfully Required The Special Trustee To Report To The Deputy Secretary Is Inconsistent With Applicable Law.

The Court Monitor opines that the Special Trustee's "functions, as envisioned by Congress, cannot be performed if he must report to [the Deputy Secretary,] who has been put in charge of trust reform."[8] Seventh Report at 35. Elsewhere, he asserts that, by placing the Special Trustee under the supervision of the Deputy Secretary, the Secretary has "directly violat[ed] the 1994 Reform Act and [made] it impossible for the Special Trustee to oversee trust reform." Id. at 82. The Court Monitor's conclusion is not consistent with applicable law.

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[7] Perhaps realizing that the Special Trustee is a political appointee who serves at the pleasure of the President, the Court Monitor seems to suggest the Secretary's memorandum expressing concerns about the Special Trustee's performance could qualify as retaliation against career employees. He warns, "[c]ertainly any further actions of Defendants regarding OST career employees would qualify for judicial examination and possible action in light of the long shadow cast by the Secretary's memorandum." Seventh Report at 55 n.16. The Court Monitor points to no action whatsoever taken against any career employee.

[8] On November 14, 2001, Interior Defendants filed with the Court their Notice of Proposed Department of the Interior Reorganization to Improve Indian Trust Assets Management. Accompanying the Notice was the declaration of Deputy Secretary J. Steven Griles stating, in response to the Court's question as to who is in charge of trust reform, that he has undertaken the responsibility to exercise authority over the various trust reform functions currently spread among, primarily, OST, BIA, and OHTA. The Special Trustee apparently did not object. The Notice also includes a copy of the November 14, 2002 joint memorandum from the Special Trustee and the Assistant Secretary - Indian Affairs to the Secretary, recommending a new organizational structure for Indian trust asset management. The joint memorandum refers to the Court's "who's in charge" question to which the Deputy Secretary's memorandum concurrently responded.

The Indian Trust Fund Management Reform Act ("Reform Act") provides that "[t]he Office [of the Special Trustee] shall be headed by the Special Trustee who shall report directly to the Secretary." 25 U.S.C. § 4042(a). The Court Monitor's analysis goes no further than this single provision of the statute. He simply assumes "report directly to the Secretary" means "report directly and only to the person of the Secretary" and asserts that the Secretary has violated the law by requiring the Special Trustee to report to the Deputy Secretary, and that this reporting requirement prevents the Special Trustee from doing his job. But his argument establishes that his complaint is with the Reform Act itself – which makes the Special Trustee responsible to the Secretary – and not with the Secretary's requirement that the Special Trustee report to the Deputy Secretary. The Court Monitor states that "[p]olitically the position of Special Trustee is untenable because of its having been placed [by the Reform Act] within the Department of the Interior." Seventh Report at 80. In his view, the provisions of the Reform Act ensure that the Special Trustee "can never have the independence or receive the support necessary from the . . . Secretary to do his job," id. whether he reports to the Secretary or her delegee. In other words, the problem articulated by the Special Trustee – that the Special Trustee must report to the person in charge of trust reform – is inherent in the Reform Act, and not created by the Secretary's decision to delegate authority to the Deputy Secretary. The Court Monitor states:

> No Secretary can allow a subordinate to publicly question his or her direction. But that is exactly what the Special Trustee must do on a regular basis if he is doing his job. . . . He is a critic within her tent. But he reports to her. He may have to tell the Congress (and through the *Cobell* litigation, this Court) that the Secretary has refused to take his advice and has impeded the progress of trust reform.

Id. at 79.

The Court Monitor ignores the plain import of the Reform Act and fails to consider other applicable statutes and authority that inform the proper reading of the Act. As this Court recognized, Congress empowered the President to "prepare a reorganization plan specifying the reorganizations he finds are necessary," including "the authorization of an officer to delegate any of his functions." 5 U.S.C. § 903(a)(5); see Cobell v. Babbitt, 91 F. Supp. 2d at 52. The President's Reorganization Plan No. 3 of 1950 transferred "all functions of all other officers of the Department of the Interior and all functions of all agencies and employees of such Department" (with the exception of two functions not relevant to this case) to the Secretary of the Interior. Reorganization Plan No. 3 of 1950 § 1(a), 5 U.S.C. App. 1; Cobell v. Babbitt, 91 F. Supp. 2d at 52. The Reorganization Plan also authorized the Secretary to "make such provisions as [s]he shall deem appropriate authorizing the performance by any other officer, or by any agency or employee, of the Department of the Interior of any function of the Secretary, including any function transferred to the Secretary by the provisions of this reorganization plan," and to "effect such transfers within the Department of the Interior of any . . . personnel . . . as [s]he may deem necessary in order to carry out the provisions of this reorganization plan." Reorganization Plan No. 3 of 1950 §§ 2 & 5, 5 U.S.C. App. 1; Cobell v. Babbitt, 91 F. Supp. 2d at 52. As this Court recognized, the Secretary has "broad authority . . . to organize [her] department as [s]he wishes," and the Reform Act does not "limit[] [her] broad powers in this respect." Cobell v. Babbitt, 91 F. Supp. 2d at 52.

To support his opinion that the Special Trustee's role is frustrated by reporting to the Deputy Secretary, the Court Monitor partially quotes from the Reform Act: "The Special Trustee shall *oversee all reform efforts* . . . ." Seventh Report at 36 (quoting 25 U.S.C. § 4043(b)(1))

(emphasis in Seventh Report). But under the heading "General oversight of reform efforts," the statute actually provides that "[t]he Special Trustee shall oversee all reform efforts *within the Bureau [of Indian Affairs], the Bureau of Land Management, and the Minerals Management Service* relating to the trust responsibilities of the Secretary to ensure the establishment of policies, procedures, systems and practices *to allow the Secretary to discharge [her] trust responsibilities* in compliance with this chapter." 25 U.S.C. § 4043(b)(1) (emphasis added). As this Court acknowledged, "[i]f Congress truly wanted a completely independent trustee to oversee trust management . . . then [it] surely would have explicitly restricted the Secretary's powers over the Special Trustee and his office." Cobell v. Babbitt, 91 F. Supp. 2d at 52. Instead, Congress placed the Office of the Special Trustee within the Department of Interior under the supervision of the Secretary – the official ultimately responsible for trust reform. See 25 U.S.C. § 4042(a). Thus, the Court Monitor's opinion that the Special Trustee cannot report to the official "in charge of trust reform," Seventh Report at 36, and his assertion that the Special Trustee is like an "outside 'auditor,'" Id. at 56, an "outside regulator," id. at 36, or an "inspector general," id., are inconsistent with the role of the Special Trustee established by Congress. In accordance with the President's July 11, 2001 Executive Order (Attachment H), the Secretary has assigned Chief Operating Officer duties to the Deputy Secretary, and has delegated to him broad authority to act for her in overseeing all of the Presidential appointees and other officials in the Department of the Interior. See Seventh Report at Tab 8. This action was entirely consistent with the authority granted to the Secretary by Congress and in no sense a "violation" of any law.

Accordingly, the Court Monitor's assertion that "the Special Trustee cannot be expected by the Secretary or the Deputy Secretary to function as just another member of the Deputy

Secretary's staff subject to the acceptance or rejection of his advice and observations," Seventh Report at 36, is incorrect. Congress did not make the Special Trustee a completely independent critic of trust reform at Interior. He is required to report and be accountable to his political superiors. As this Court has stated, "the text of the statute . . . [says] in no uncertain terms that 'the Special Trustee . . . shall report . . . to the Secretary.'" Cobell v. Babbitt, 91 F. Supp. 2d at 52. Like any other secretarial advisor, the Special Trustee must accept the risk that his advice may not be accepted, by either the Secretary or her delegee. The Court Monitor's criticism of the Secretary for requiring the Special Trustee to report to the Deputy Secretary must be rejected.

In any event, the Court Monitor's notions that the Secretary has generally not heeded the advice of the Special Trustee are unfounded. The Special Trustee stated in his testimony to the Senate Indian Affairs Committee that he "believe[s] that the Special Trustee must have the opportunity to provide candid and informed guidance directly to the Secretary as she seeks the more effective management of the trust responsibilities under her control." Seventh Report at 20 & Tab 1. The Special Trustee has been afforded many opportunities to provide this sort of guidance to the Secretary, and has, on occasion, taken the initiative to do so. As explained below, the Secretary and the Deputy Secretary have given the Special Trustee full authority to carry out his oversight role. The Court Monitor's allegation that the Secretary and other Interior officials have attempted to curtail the oversight responsibility of the Special Trustee must be rejected.

### C. The Secretary Has Acted To *Expand* The Special Trustee's Authority.

The Court Monitor's remark that "[i]t is inconceivable that the Secretarial memorandum's direction [that the Special Trustee report to the Deputy Secretary] is meant to and

would do anything less than curtail the oversight role and independence of the Special Trustee and his staff," id. at 36, is belied by actions the Secretary has taken to *expand* the Special Trustee's authority. On July 10, 2001, the Secretary issued a Secretarial Order "delegat[ing] additional authority to the Special Trustee . . . to implement trust reform within the Department of the Interior." Secretarial Order No. 3232 (Jul. 10, 2001). The Secretarial Order delegated the following authority to the Special Trustee:

> a. If, after consultation with the head of any bureau or office of the Department, the Special Trustee determines that any policy or practice that is within the control of such bureau or office either hinders or may hinder trust reform, the Special Trustee, with the advice and counsel of the Solicitor's Office, may issue written directives detailing the appropriate change in policy or practice. Unless the Secretary disapproves such directive in writing within 30 days of issuance, the directive of the Special Trustee shall have the force and effect of a Secretary's Order.
>
> b. The Special Trustee, with the assistance of the Office of the Assistant Secretary - Policy, Management and Budget, shall provide to the heads of all bureaus and offices of the Department, language regarding trust reform for inclusion in the annual performance plans of employees of the Department who are engaged in trust reform.
>
> c. The Special Trustee may provide, as he/she deems appropriate, comments and/or recommendations to be considered by the heads of all bureaus and offices of the Department for inclusion in the regular performance reviews of employees of the Department who are engaged in trust reform.

Id.

On February 6, 2002, eight months after receiving this authority, the Special Trustee stated in written testimony to the Senate Committee on Indian Affairs that "the authority to issue [written directives requiring the adoption of appropriate changes in existing policies that hinder

trust reform] *may prove* a valuable tool." Seventh Report at 6 (quoting Special Trustee's written testimony to the Senate Committee on Indian Affairs) (emphasis added). To date, the Special Trustee has used this authority once, see id. at 17 (quoting Trial Tr. 2407-2408), and his directive was not overruled. The Secretary has delegated to the Special Trustee the broad authority to issue directives requiring any change in policy or practice within any bureau or office of the Department that he determines may hinder trust reform unless the Secretary expressly disapproves the directive in writing within thirty days, and the Court Monitor complains that the Special Trustee cannot do his job because he, like all Presidential appointees and officials within the Department, reports to the Deputy Secretary!

The Court Monitor quotes the following testimony from the Special Trustee regarding this expanded authority at the recent contempt trial in response to questions by the government:

> Q. Now – you talked about the notion of having somebody directly in charge. The Secretary's June 10th, 2001 orders, one of those set up a different structure, correct, to by its terms put you in charge of trust reform? Correct?
>
> A. Not really.
>
> Q. Why do you say not really? Because as I understood the order, you were given the same authority as the Secretary, meaning the ability to direct members of the Department, of the Bureau of Indian Affairs, unless a specific order was appealed to the Secretary. So that's a fairly broad authority, isn't it?
>
> A. Not really. What I really wanted was to have line authority. This is what came out of that. The problem with what I've got now, which I have used once and I may use again fairly soon, is that it is appealable. I believe the Secretary will back me up, frankly, but nevertheless the effectiveness of something like this is often in the eyes of the beholder who may be the person who wants to get away with something or not do the job properly. And the right of appeal undercuts a large part of this.

Id. at 17 (quoting Trial Tr. 2407-2408). In this remarkable testimony, the Special Trustee suggests that the broad authority delegated to him by the Secretary is ineffective because she can overrule him, but at the same time expresses his belief that the Secretary will support him in the use of the authority. He concedes that he used the authority only once, and explains that what he really wants is line authority (which, of course, could also be overruled by the Secretary). But Congress did not authorize the Special Trustee to assume line authority over all trust reform efforts, and, as discussed above, the Special Trustee's performance in those areas in which he has been granted line authority has – in the view even of the Court-appointed Special Master – not inspired confidence.

Moreover, the Court Monitor's repeated assertions that the Special Trustee is the only official qualified to guide trust reform (and thus, presumably, the only official qualified to have line authority over trust operations) are misguided. See, e.g., Seventh Report at 24 ("The only senior management personnel with trust experience within the DOI reside within the OST. None are [sic] present in any operation presently directed by the Deputy Secretary."); id. at 73 ("The only office that has sufficient trust knowledge and experience to guide trust reform within the DOI is the Office of the Special Trustee."). He cites no evidence comparing the knowledge and experience of OST employees with the knowledge and experience of other Interior officials. Moreover, he disregards attributes other than "trust experience" that are essential to success in trust reform management, such as management experience (particularly in a government agency), proven leadership ability, and familiarity with Indian law and Indian issues. The Director of the Office of Indian Trust Transition, Ross Swimmer, is not only a former tribal leader and banker, but an attorney who served as chairman of one bank and CEO and chairman of another, whose

legal education included property, wills, trusts, and estates, and whose early practice for over five years focused on real property, estates, and trusts. See April 16, 2002 Declaration of Ross O. Swimmer at ¶¶ 1-8 (Attachment F). He is a licensed asset advisor and has been responsible for managing assets belonging to third parties, has probated estates, written wills, and administered trusts as a fiduciary. Id. He has led large organizations including an American Indian Tribe of over 200,000 members and served as a past Assistant Secretary for Indian Affairs. Id. This unique combination of private, federal, and Indian management experience meets or exceeds the Special Trustee's standards for "keys to successful trust management:" See Seventh Report at 23 (listing the Special Trustee's "keys to successful trust management: [e]xecutive leadership[,] [a]ccountability[,] [p]roject management[,] [t]rust experience[, and] [r]isk management/oversight."). As the Court Monitor acknowledges, Donna Erwin, who is an "experienced trust official" with "a proven record of trust reform accomplishment" is assigned to Mr. Swimmer's staff.[9] Id. at 38. Additional trust expertise in the Department is available from employees who obtained specialized trust training from the Cannon Financial Institute, which provides the same training courses that the private sector uses for trust training. April 16, 2002 Declaration of Ross O. Swimmer at ¶ 9 (Attachment F).[10]

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[9] The Court Monitor states without citation that "the Special Trustee, who is [Donna Erwin's] boss, does not believe she has been given the resources to do her job." Seventh Report at 38. Yet elsewhere the Court Monitor states that "Donna Erwin is still part of OST and relies upon OST for her personnel hiring and monies to fund her projects." Id. at 24 n.5.

[10] The insufficiency of looking solely to expertise in trust operations has already been observed. In discussing problems confronted by the Office of Indian Trust Transition, Interior's Status Report to the Court Number Nine reports:

> Finally, it was noted during the interviews with the project

(continued...)

The Secretary has delegated exceptionally broad authority to the Special Trustee. The Special Trustee has, for the most part, declined to use this authority. Her decision not to expand the Special Trustee's line authority is a decision regarding the organization of the Department of the Interior that Congress has left to the Secretary's sole discretion, see Section IV.B., supra. The Court Monitor's attempt to substitute his judgment on this point threatens an infringement on core executive power, as explained in Section I, above.

### D. The Court Monitor's Complaints About The Current System Are Directed To The Wrong Branch Of Government.

The Court Monitor's complaint that Congress created a dysfunctional system when it enacted the Reform Act deserves a brief comment. The Court Monitor states that "[p]olitically the position of Special Trustee is untenable because of its having been placed within the Department of the Interior." Seventh Report at 80. But the long-term solution mentioned by the Court Monitor – "removing the Indian Trust from DOI and placing it either in a government

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[10](...continued)

> managers, there was an increased level of friction between the BIA and OST organizations. At the interviews, it became apparent that this problem is increasing and must be addressed sooner rather than later . . . .
>
> Some ways to mitigate this problem will be more and better communication between BIA and OST and more personal contact between the respective managers. A few OST Senior Managers have a good understanding of general trust operations but lack knowledge of Indian reservation culture and customs. BIA has a good understanding of the latter but not the former. Part of the transition effort will be to get these organizations on the same page with regard to trust activities so that whatever transition takes place to a new organization, it will be as efficient and effective as possible.

Status Report To The Court Number Nine at 48 (May 1, 2002)

agency with experience in banking and trust or in a newly created agency wholly separate from DOI," id. at 84-85 – can only be effected by Congress. The short-term solution he mentions – appointment of a receiver, id. at 85 – would violate the Constitution. See Defendants' Opposition To Plaintiffs' Motion To Amend Their Motion To Reopen Trial One In This Action To Appoint A Receiver (filed Nov. 15, 2001).

The Secretary is attempting to make the existing system work. She is working with the Court, Congress, and the Indian beneficiaries to bring about trust management reform and to implement critical trust management practices and systems. The Court Monitor concedes that "there are indications that [this administration] ha[s] committed to and started some basic programs to lay a foundation for trust reform," that "[t]he Special Trustee has applauded the Secretary's efforts to form a new organization to handle trust reform and that process has been begun with the Tribal Task Force," and that "[t]he Deputy Special Trustee, Donna Erwin, and EDS have begun to form teams of experienced operational personnel throughout the Regions to examine the 'as is' business plan leading to the development of a new business plan on which system requirements can be based." Seventh Report at 84. The Secretary has acknowledged that many challenges remain, but has made clear – by words and by action – her unequivocal commitment to ensuring the progress of effective trust reform.

## V. The Court Monitor's Allegations That Interior Defendants And Their Counsel Conspired To Malign The Special Trustee Are Meritless.

In addition to positing, without evidence, that Interior Defendants expressed concern about the Special Trustee's performance to retaliate against him and the Principal Deputy Special Trustee for their testimony at the recent contempt trial, the Court Monitor constructs an equally

elaborate – and equally unsubstantiated – theory about a supposed conspiracy between Interior Defendants and their counsel in the Solicitor's Office and the Department of Justice.

The Court Monitor never identifies specifically the conspiracy that allegedly occurred or those who participated. Instead, his discussion of the alleged misconduct of Interior Defendants' attorneys reads much more like a fictional narrative, peppered with vague, oblique references to unspecified misdeeds, than a fact-based, rationally-argued legal analysis.[11] The gist of the Court Monitor's argument, however, appears to be that Interior Defendants' counsel encouraged (and joined with) Interior Defendants to malign the Special Trustee and Principal Deputy Special Trustee so as to discredit the testimony they gave at the recent contempt trial. According to the Court Monitor, Interior Defendants' counsel recognized that this testimony constituted "[t]he majority of the testimony and evidence produced by the Plaintiffs' counsel at trial" and concluded that, by discrediting it, they would shield Interior Defendants from a possible contempt finding. Report at 72-73.

As his primary "evidence" for this outrageous allegation, the Court Monitor cites a March 29, 2002 letter from Deputy Director Sandra P. Spooner, a Department of Justice attorney, to the Counselor to the Solicitor, Larry Jensen ("March 29 letter"). However, as explained in Section III, above, this letter is a privileged document that was improperly attached to the Seventh Report. Interior Defendants have not waived any privilege for this document (or any other privileged document identified in Section III), nor have they disclosed it (or any other

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[11]Thus, for example, in a characteristically provocative and prejudicial turn of phrase, he writes: "*Someone* is either inept or has intentionally misled the Secretary and would like to mislead this Court. Why? Perhaps the responsible parties are both inept and disingenuous. . . . The reader could be forgiven for putting two and two together and looking to the Defendants' attorneys, once again, for an explanation." Seventh Report at 72 (emphasis in original).

privileged document discussed in Section III) except to the Special Master, *in camera*, under the condition that it not be produced or made public until the Interior Defendants had an opportunity to seek a final ruling on the issue of privileges. As discussed in Section III, all portions of the Seventh Report that refer to or discuss these privileged documents should be stricken from the Report.

However, the Interior Defendants cannot leave the reckless allegations of misconduct contained in the Seventh Report unanswered. However, they are concerned about a potential waiver of privilege if the following portion of this Response, which requires discussion of privileged documents improperly disclosed by the Court Monitor, is not filed under seal. Accordingly, in order to preserve privileges to which they are entitled, Interior Defendants are lodging the following portion of this Section with the Court and filing an accompanying motion seeking leave to file portions of this Section under seal.

**[A portion of Section V is lodged with the Court with an accompanying motion for leave to file it under seal and is redacted here.]**

The only other "evidence" the Court Monitor cites to substantiate his allegation that the Solicitor's Office and the Department of Justice conspired with Interior Defendants to discredit the Office of the Special Trustee is an April 25, 2002 memorandum from the Secretary to the Special Trustee, asking him to provide a declaration in response to the Special Master's Second Investigative Report Regarding the Office of Trust Records. The memorandum states, "[i]f the information is not presented in the form of a declaration, I am advised by the DOJ attorneys that the Court will give it little or no weight." April 25, 2002 Memorandum from Secretary of the Interior to Special Trustee. It then notes, "[y]our unwillingness to attest to the truth of the

information in your memorandum to the Deputy Secretary naturally raises a concern about the reliability of the information." Id.

According to the Court Monitor, "this Secretarial directive," like "[t]he [March 29] DOJ memorandum" "infer[s] [sic] that [the Special Trustee's] representations of his actions and his statements to this Court are not credible" and thereby seeks to discredit his testimony in the recent contempt trial.[12] Seventh Report at 71-72. This argument, like the Court Monitor's arguments regarding the March 29 letter, appears to be based on a fundamental misconception of how the judicial process works. It is standard practice that, when parties in a litigation seek to submit written testimony in support of a brief they have filed, they do so in the form of a declaration signed under penalty of perjury. See Fed. R. Civ. P. 43(e); 28 U.S.C. § 1746; see also Fed. R. Civ. P. 56. Thus, this Court's Local Civil Rule 5.1(h) states that to ensure that testimony not given under oath has the same evidentiary value as testimony under oath, the unsworn testimony should be provided in the form of a declaration signed under penalty of perjury. See Local Civil Rule 5.1(h) ("Verification. Whenever any matter is required or permitted by law or by rule to be supported by the sworn written statement of a person (other than a deposition, oath of office, or oath required to be taken before a specified official other than a notary public), the matter may, with the same force and effect, be supported by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed as true under penalty of

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[12] In the Fourth Report of the Court Monitor and the Supplemental Report Amending the Second and Fourth Reports of the Court Monitor, the Court Monitor criticizes the Interior Defendants for failing to obtain sufficient verifications of information submitted in the Quarterly Reports. It is puzzling that he now criticizes Interior Defendants for attempting to obtain verification of information submitted in response to the Special Master's report and then seemingly opines that unverified memoranda (at least those from the Special Trustee) provide a satisfactory predicate for factual assertions.

perjury, and dated . . . ."). Given this standard practice, it was entirely natural and logical for Interior Defendants and their counsel to request that the Special Trustee express his views to the Court about the Special Master's Report – a Report concerning one of the Office of the Special Trustee's own programs – in the form of a declaration signed under penalty of perjury. Furthermore, since the Court's own rules provide that such a declaration is the way to ensure that unsworn testimony is given full evidentiary weight, it makes perfect sense that the Special Trustee's refusal to sign such a declaration caused Interior Defendants to be "concern[ed] about the reliability of the information" he was conveying. April 25 Memorandum from Secretary of the Interior to Special Trustee.[13]

The Court Monitor repeatedly emphasizes the need for accountability from those responsible for trust reform. He notes that the Special Trustee has similarly emphasized this need. Yet, when the Secretary asked the Special Trustee to be accountable, through the provision of an explanatory declaration, for the records keeping function for which he is programmatically responsible, he declined. Given the special position he occupies, the example set by the Special Trustee's decision in this matter was, quite naturally, of serious concern to the Secretary. Remarkably, the Court Monitor transforms the Secretary's request for this accountability into an allegedly retaliatory act.

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[13] The Court Monitor argues that, given the alleged efforts of Interior Defendants and their counsel to malign the Special Trustee, the Special Trustee's reluctance to "sign [a declaration] provided by the DOI and DOJ attorneys is perfectly understandable." Report at 76. The Secretary, however, stated very clearly in her April 25 memorandum to the Special Trustee that "[o]bviously, you have complete freedom to craft a declaration that accurately states your views. I am not asking you to make any particular statement." April 25 Memorandum from Secretary to Special Trustee.

The Court Monitor's elaborate conspiracy theory is absurd on its face and has no basis in fact. It is based on fundamental misconceptions about the proper roles of the Department of Justice and the Department of the Interior and the judicial process in general. There is no conspiracy. The Department of Justice is doing its best to represent its client, the United States; the Solicitor's Office is doing its best to represent its client, the Department of the Interior; and the Interior Defendants are doing their best to bring about trust reform. The Interior Defendants strongly object to the Court Monitor's irresponsible allegations of misconduct.[14]

## VI. The Court Should Direct The Court Monitor To Revise His Report To Eliminate All References To Government Employees As "Contemnors."

Throughout the Seventh Report, the Court Monitor refers to government employees against whom the plaintiffs have sought contempt sanctions as "contemnors." See, e.g. Seventh Report at 24 ("This Court has questioned both the Secretary and the Deputy Secretary on their statements concerning the present contemnors that consist mainly of DOI attorneys and officials."); id. at 26 ("A specific example of that tone deafness is the further testimony of the Deputy Secretary concerning the role played by one of the attorney contemnors in the decision-making process on the reorganization."); id. at 27-28 ("[Edith Blackwell] was . . . a contemnor central to the core of the Court Monitor's First and Second Reports. . . ."); id. at 54 ("The Secretary and Deputy Secretary have testified that they continue to rely upon at least one of these contemnors – the attorney Edith Blackwell – to provide them with the 'history' of trust reform

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[14] To the extent that the conduct of government attorneys is at all relevant, it should be noted that, where plaintiffs' counsel explored this issue at various points in the direct examination of the Principal Deputy Special Trustee during the contempt trial, his testimony generally disproves a theory of misconduct in the handling of this case. See, e.g. Trial Tr. at 129-30, 165-70 (Dec. 10, 2001); 326-31, 362 (Dec. 11, 2001); 516-18, 530-33 (Dec. 12, 2001).

and statutory and legal precedent."). Not only have these employees not been held in contempt, but the Court has yet to issue a show cause order.[15] If the Court issues such an order, each of these employees will be entitled to a trial on the merits of the plaintiffs' contempt allegations, after which the Court will issue a decision. In the meantime, the Court Monitor's defamatory remarks unjustly damage the reputations of these employees and suggest a prejudgment of this issue that this Court should not countenance.[16]

In the Seventh Report, the Court Monitor goes so far as to state that "[t]here is a distinct lack of recognition on the part of the Secretary and the Deputy Secretary of the potential that those DOI officials under the plaintiffs' citation for contempt of the Court might actually have committed acts sufficient to render their present or future service on trust reform inadvisable and harmful to trust reform progress," and that "their testimony casts doubt on their understanding of the fiduciary obligations owed to the IIM accountholders and the legal obligations owed to this Court." Seventh Report at 26. The Court Monitor has not only indicated that the alleged

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[15] Thus, these employees are not "before this Court on allegations of contempt" either. See Seventh Report at 79 ("Nearly 40 former or current senior managers, attorneys, and employees of the DOI, BIA, Solicitor's Office, and DOJ are before this Court on allegations of contempt.").

[16] The Department of Justice so advised the Court Monitor in a May 7, 2002 letter, and requested that he issue a revised report that, at a minimum, deleted the offensive references to "contemnors." See Letter from Sandra P. Spooner, Deputy Director, Department of Justice, to Joseph S. Kieffer, III, Court Monitor (May 7, 2002) (Attachment I). The Court Monitor refused this request in a May 13, 2002 letter to the Department of Justice, stating that "the overall thrust of the Seventh Report's comments about them was that they had not been found liable for any civil or criminal penalties as of the date of the Report." See Letter from Joseph S. Kieffer, III, Court Monitor, to Sandra P. Spooner, Deputy Director, Department of Justice (May 13, 2002) (Attachment J). The Interior Defendants dispute this characterization of the Seventh Report, but however it is characterized, its public references to these individuals as "contemnors" ("person[s] who [are] guilty of contempt," Black's Law Dictionary 312 (7th Ed. 1999)) cannot be redeemed by a statement elsewhere in the report acknowledging that they have not been found liable.

contemnors are guilty, but has also determined that the Secretary and Deputy Secretary do not understand the fiduciary obligations owed to the IIM accountholders or their legal obligations to this Court because they do not share his view! This Court should not allow such statements to remain in the record.

The Court Monitor's treatment of Edith Blackwell, Deputy Associate Solicitor for the Department of the Interior, also demands comment. The Court Monitor asserts that "[a] specific example of th[e] tone deafness [of the Secretary and Deputy Secretary regarding the potential that DOI officials might "actually have committed acts sufficient to render their present or future service on trust reform inadvisable and harmful to trust reform progress"] is the . . . testimony of the Deputy Secretary concerning the role played by one of the attorney contemnors in the decision-making process on the reorganization." Seventh Report at 26. But the testimony quoted by the Court Monitor plainly establishes that Ms. Blackwell was *not* involved in the decision-making process on the reorganization:

> Q. All right. So, the individuals who provided advice with regard to how the trust should be managed from the Solicitor's Office, you still relied on to prepare the restructuring; correct?
>
> A. No. What I relied on, sir, was to make sure that the court decisions, that we had all the information and policies that came out of them . . . . The organization in itself, there was no one – Ms. Blackwell was not involved in that determination or anything else.
>
> Q. No. I'm not asking you about a determination. She provide (sic) advice; correct?
>
> A. No, she provided us briefings on what the Court's decisions had been and the secretarial orders that had been written, which were general in nature.
>
> Q. And did she provide you advice on the Solicitor's opinions as well in that regard?

A. No, she did not.

Seventh Report at 27 (quoting Trial Tr. at 4080-82). In this exchange, plaintiffs' counsel tried three times to get the Deputy Secretary to state that Ms. Blackwell had advised him in developing the reorganization plan, and each time he denied the plaintiffs' suggestion. It is the answers, not the insinuation in the questions, that constitute the record in this case.

The Deputy Secretary testified regarding Ms. Blackwell's role as follows: "Well, we had the policies that were set forth, and we had briefings on [Mitchell I and Mitchell II], which were Supreme Court decisions on trust, and the integration of all of those." Seventh Report at 27 (quoting Trial Tr. at 4080-82). The Court Monitor opines: "Whatever advice Edith Blackwell provided the Secretary and Deputy Secretary about trust case and statutory law, her involvement with these senior DOI executives was ill advised. She was not only a contemnor central to the core of the Court Monitor's First and Second Reports . . . [but] had been excused from further work on trust reform by the present Solicitor long before she was called on to brief the DOI leadership during their decision-making meetings regarding reorganization of the trust operations and reform efforts." Id. at 27-28.

First, as explained above, Ms. Blackwell is not a "contemnor," and the Court Monitor's disparagement of her reputation by describing her as such is inexcusable. Second, the Deputy Secretary testified repeatedly that Ms. Blackwell did not provide "advice." It is not improper for an experienced career attorney in the Solicitor's Office to brief new political appointees about Supreme Court decisional authority. The Court Monitor asserts that Ms. Blackwell "had been excused from further work on trust reform," id. at 28, but in fact Ms. Blackwell was recused from "any further work in the areas of on-going Cobell litigation matters and the High Level

Implementation Plan and its sub-projects." See September 4, 2001 Memorandum from William G. Myers, Solicitor (Attachment K). The recusal memorandum specifically states that "Ms. Blackwell should continue to be available to discuss [these matters] in a historical context," and that "she should also continue to work on [] general Indian trust issues." Id. Reviewing the legal precedents applicable to Interior's trust activities falls well within the scope of Ms. Blackwell's duties.

Interior Defendants object strenuously to the Court Monitor's disregard of the presumption of innocence and fundamental due process rights that are at the heart of our system of justice. The government employees against whom the plaintiffs have made contempt allegations are not "contemnors," and for the Court Monitor to refer to them in this manner demonstrates a callous insensitivity to their reasonable expectations of a fair, impartial forum in which the allegations against them will be judged.[17] The Interior Defendants request that the Court immediately direct the Court Monitor to remove from his Report all references to government employees as "contemnors," and all passages that presume to prejudge these individuals.

## VI. Additional Objections

In addition to the objections set forth in this Response, the Interior Defendants hereby incorporate by reference the objections set forth in the attached Addendum. Due to the sheer

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[17] We have seen at least two other examples of the Court Monitor's apparent refusal to consider that the contempt allegations might lack merit. See Sixth Report of the Court Monitor at 29 ("nowhere can be found any indication that those who *have committed* or permitted these actions *constituting contempt on the court* have been or will be held accountable" (emphasis added)); Letter from Joseph S. Kieffer, III, Court Monitor, to Sandra P. Spooner, Deputy Director, Department of Justice (May 6, 2002) (discussing depositions "that might be relevant to the defense of any of the Cobell litigation contemnors") (Attachment L).

numbers involved, each and every factual assertion and inference contained in the Seventh Report could not be addressed on its merits, and the enlargement of time Interior Defendants requested to respond to the Seventh Report has not been granted. Thus, the Addendum sets forth a list of principal factual assertions and inferences in the Seventh Report to which Interior Defendants object.

## CONCLUSION

The Interior Defendants object to the Seventh Report in its entirety. It exc For all of these reasons, the Court should reject the Seventh Report in its entirety.

Dated: May 16, 2002

Respectfully submitted,

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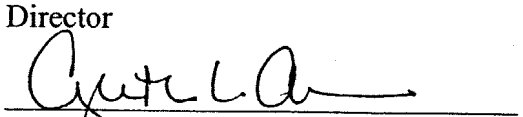

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**ADDENDUM TO DEPARTMENT OF THE INTERIOR'S RESPONSE TO THE SEVENTH REPORT OF THE COURT MONITOR**

The Secretary of the Interior and the Assistant Secretary - Indian Affairs ("Interior Defendants") submit this addendum to their Response to the Seventh Report of the Court Monitor ("7th Report") setting forth objections to principal factual assertions and inferences contained in the 7th Report. To the extent that the 7th Report repeats or incorporates by reference factual assertions set forth in earlier Court Monitor reports or the contempt trial record, Interior Defendants incorporate by reference all prior objections and responses to prior reports and all responsive evidence contained in the record of trial. As noted in Interior's Response To The Seventh Report Of The Court Monitor, the Interior Defendants' request for an enlargement of time to respond to the 7th Report has not been ruled upon by the Court. Given additional time, Interior could determine that some of the below objections should be withdrawn in whole or in part.

Interior Defendants object to the following factual assertions and inferences set forth in the 7th Report:

* The Special Trustee has been consistent in his written statements about his concerns and recommendations regarding trust reform as presently being carried out. (7th Report at 19.)
* Interior's trust reform effort lacks sufficient experienced senior managers. (7th Report at 24.)
* The only senior managers with trust experience within DOI reside within OST. The executives working on trust reform, including the Deputy Secretary, have no

trust experience, nor, but for Donna Erwin, do they have anyone working for them who does. The two officials who are preparing the Strategic Plan that will be the foundation for DOI trust operations and standards of performance come from OSM and USGS and have extensive experience in strategic planning but no trust experience. (7th Report at 24.)

* The Secretary and Deputy Secretary fail to recognize the potential that those DOI officials who are cited in the plaintiffs' contempt motions might have acted so as to render their service on trust reform inadvisable and harmful to trust reform progress. (7th Report at 26.)

* Edith Blackwell is a contemnor, and her providing advice to senior DOI executives on trust case and statutory law was ill-advised. (7th Report at 27-28.)

* The Special Trustee and Deputy Special Trustee had objected to statistical sampling as a method to conduct the historical accounting. (7th Report at 28.)

* The Secretary sent the Solicitor to meet with the Special Trustee. (7th Report at 32).

* No one accepts the Special Trustee's Congressionally mandated role or listens to his advice and his direction is thwarted at every turn. (7th Report at 33.)

* The memorandum of April 17, 2002 reveals that the Secretary lacks an understanding of the history of trust reform, lacks an appreciation for and misunderstands the role of the Special Trustee. (7th Report at 35.)

* The memorandum of April 17, 2002 is meant to and would curtail the role and independence of the Special Trustee and his staff. The Special Trustee cannot

perform his Congressionally mandated duties working for and reporting to the DOI official in charge of trust operations and reform. (7th Report at 36.)

* The TMIP committee badgered and bludgeoned the Special Trustee into modifying and weakening his quarterly report observations. (7th Report at 36.)

* The DOI litigation activities are detrimental to IIM account holders and Tribal trust beneficiaries. (7th Report at 36-37.)

* The Secretary was misinformed about the Special Trustee's role in compiling and making observations to the quarterly reports or his oversight responsibilities. (7th Report at 37.)

* The Secretary rejected out of hand the Special Trustee's offer to place his expertise and that of his staff at her disposal. (7th Report at 37-38.)

* TFAS is the only successful trust related system that has been put into place since passage of the 1994 Reform Act. (7th Report at 38 n.7.)

* The Secretary has placed the Deputy Secretary, with the help of Messrs. Cason and Swimmer, in charge of trust reform and its development without sufficient trust management experience and support to effectively bring about trust reform. (7th Report at 38.)

* The Special Trustee took over compilation of the quarterly reports from the Office of Plans, Management and Budget; the respective Bureaus and project managers were responsible for preparation of the reports. (7th Report at 39.)

* The record of inaccurate, incomplete and untruthful reports compiled by most of the subproject managers (certainly with regard to TAAMS and BIA Data Cleanup

subprojects addressed in the Second and Third Reports of the Court Monitor) was the subject of repeated Observations of the Special Trustee. (7th Report at 39.)

* The Special Trustee's attempts to bring transparency to the quarterly reports, including those during the administration of the present Secretary, received little support and the direct obstruction of not only the BIA but also attorneys within the Office of the Solicitor. (7th Report at 39.)

* But for the Special Trustee's retention of EDS and recommendation to the Secretary that EDS examine the true status of trust reform, the Court would never have known from the Defendants the abysmal state of trust reform finally addressed in the Eighth Quarterly Report. (7th Report at 39, 40.)

* It is because of the Special Trustee's actions and performance of his Congressionally-mandated oversight role in the face of strong resistance by the subordinates of the past and present Secretaries of the Interior that the IIM accountholders, the Tribal beneficiaries of the Indian Trust, and this Court know about the status of trust reform. (7th Report at 40.)

* Acting Special Trustee and, later, the Special Trustee opposed the statistical sampling historical accounting. (7th Report at 40.)

* The historical accounting project was not transferred from the Special Trustee's office because of "lack of material progress." OHTA was created to begin to plan the accounting based on the Court Monitor's warning about a forthcoming report on the project's insufficiency and problematic origination. (7th Report at 42.)

* The Special Trustee was not consulted about the decision to establish OHTA. (7th Report at 42 n.13.)

* DOI officials ignored or rejected the advice of the Acting Special Trustee, the Special Trustee, and other OST officials to forego an effort to mislead the Court and the Circuit Court of Appeals (and the Indian trust beneficiaries) by concocting Federal Records (Register?) and statistical accounting processes that would never suffice as an historical accounting. (7th Report at 42.)

* The historical accounting project made little progress prior to its transfer to OHTA but for reasons having nothing to do with the Special Trustee's ability or desire to proceed with the project. (7th Report at 42.)

* Progress on the collection of missing information project was not limited by the Special Trustee's performance but by the decision of the Solicitor's office. (7th Report at 44.)

* Monies for trust reform projects, such as TAAMS and BIA Data Cleanup, were held up not by the Special Trustee's poor performance but by the Special Trustee recognizing the poor performance of BIA officials charged with trust reform duties. (7th Report at 45.)

* The Special Trustee responded to the Secretary that his concerns were not of insufficient severity to recommend a delay in the filing of the Seventh Quarterly Report. (7th Report at 46.)

* The only grounds for seeking an extension of filing the Seventh Quarterly Report was to address the previously stated concerns of the Special Trustee. (7th Report at 47.)

* The Solicitor and Counselor to the Solicitor understood fully the concerns of the Special Trustee. (7th Report at 48.)

* The Secretary has not addressed the Special Trustee's concerns that some of the subproject managers do not understand the tasks in which they are engaged. (7th Report at 52.)

* The Special Trustee has expressed concerns about the performance of the Deputy Secretary. (7th Report at 52.)

* The exchange of memoranda between the Special Trustee and the Secretary and the Special Trustee's and his staff's memoranda which preceded that exchange portray an organization that continues to founder at the most senior management levels. (7th Report at 52-53.)

* For the past two years, the Special Trustee has continually tried to work with the Secretary in devising solutions to problems that she and her senior staff do not understand they have. (7th Report at 53.)

* Senior managers without the requisite trust fiduciary are taking trust reform in the direction of litigation-driven agendas. (7th Report at 53.)

* Trust reform requires much more leadership, accountability, project management, trust experience, and oversight than it is being given for all of the activity that the Court has been told is going on. (7th Report at 53.)

* Trust reform is not advancing and is hampered by attorneys who continue to force decisions to fit litigation strategy goals. (7th Report at 53.)

* There are no indications that the Special Trustee's evaluation of trust reform is incorrect. (7th Report at 54.)

* The Special Trustee tried to be a team player. (7th Report at 54.)

* The Secretary and Deputy Secretary have appealed to the Court to release those DOI officials who have been named as contemnors from possible contempt citations without any completed investigation or knowledge of their activities. (7th Report at 54.)

* The only success in the DOI's trust reform effort has been those financial management functions within the Office of Trust Fund Management supervised by the Special Trustee. (7th Report at 55.)

* The Secretary rejected the oversight role of the Special Trustee. (7th Report at 55.)

* The Special Trustee cannot report to the Deputy Secretary because the 1994 Reform Act requires that he report to the Secretary (and Congress) on his oversight responsibilities and because he cannot be supervised by the official whose performance he must oversee. (7th Report at 55.)

* The Secretary's memorandum of April 17, 2002 contains "patently false assertions and misinterpretation of past event." (7th Report at 55 n.16.)

* The Secretary and Deputy Secretary are trying to control the Special Trustee, who has been placed within their midst to report on their performance. (7th Report at 56.)

* The Special Trustee has been thwarted in his efforts to bring about trust reform by DOI's and BIA's institutional recalcitrance and intransigence. They are culturally and politically incapable of accepting his authority or the concept that trust reform is a fiduciary obligation of the highest order. (7th Report at 63.)

* Mr. Slonaker was demoted for trying to do his job. (7th Report at 63.)

* DOI and DOJ have carried out questionable activities regarding the Special Trustee and the Special Master's investigational activities. (7th Report at 66.)

* The Defendants' attorneys failed to provide their Departmental client's key employees with guidance and information to help them avoid contempt and comply with the Court's orders. (7th Report at 69.)

* Ms. Spooner's letter of March 29, 2002 fails to put the Special Trustee and his principal deputy on notice of the concerns expressed, fails to apprize the Special Master of the full picture of the Special Trustee's concerns and requests, and was not provided to the Special Trustee. Ms. Spooner and others within the Secretary's office denied the existence of the letter in response to the Deputy Special Trustee's questioning. (7th Report at 69.)

* Hostility toward the Special Trustee has spilled over into an attempt to prejudice the Court regarding the Special Trustee and his key subordinates. (7th Report at 69.)

* The Solicitor is uninterested in finding out why Ms. Spooner or others within the Secretary's office would deny the existence of a memorandum in response to the Principal Deputy's questioning. (7th Report at 70.)

* The Solicitor was possibly aware of the Spooner letter prior to April 24, 2002. (7th Report at 70).

* DOJ and the Secretary inferred that the Special Trustee's actions are contemptuous and that his statements to the Court are not credible. (7th Report at 71.)

* The Special Trustee did not refuse to verify the Sixth or Seventh Quarterly Reports because of the status of his own subprojects' reports but because of his concerns related to the incomplete, inaccurate and misleading nature of the major subproject reports contained in them. (7th Report at 72.)

* Someone is inept or has intentionally misled the Secretary and would like to mislead the Court. (7th Report at 72.)

* Defendants' requests for declarations to respond to the Special Master's reports constitute unwarranted but sanctioned attacks on the Special Trustee and his Principal Deputy. (7th Report at 72-73.)

* Defendants seek to discredit the Special Trustee and his Principal Deputy to limit the weight of their contempt trial testimony. (7th Report at 73.)

* Defendants' attorneys did not respond to the Special Trustee's request for help. They practiced duplicity on him. (7th Report at 76.)

* The only experienced trust official within the organization established by the Secretary to begin to address trust reform has not had sufficient resources

dedicated to her or the core efforts she is undertaking to accomplish them. (7th Report at 77.)

* The EDS reports have not been evaluated in a concerted and disciplined effort to make recommendations to the Secretary for needed trust reform initiatives and languish in the face of other priorities. (7th Report at 77.)

* Defendants are subject to legal advice and counsel driven by litigation objectives rather than fulfilling the fiduciary responsibilities owed by the Secretary. (7th Report at 77.)

* The hostility shown by the Secretary's memoranda to the Special Trustee and the documented errors in her memoranda's reasoning cast doubt on the ability of her office to continue to work and communicate with the Office of the Special Trustee. (7th Report at 78.)

* Defendants have likely harassed and obstructed the Special Trustee and his staff. (7th Report at 78.)

* Defendants have come very close to retaliating against the Special Trustee and the Principal Deputy Special Trustee. (7th Report at 78, 81.)

* Defendants' subordinates and attorneys placed the Special Trustee's reputation under a cloud to evade his and, possibly, the Court's oversight; they created out of whole cloth a bill of particulars on which to base his discrediting and potential dismissal; they have attempted to discredit him and his staff before this Court in a most public and demeaning manner. (7th Report at 78, 81, 83.)

* Senior management, attorneys, officials of DOI, DOJ and BIA have obstructed, pressured, delayed, dissembled and been hostile or retaliated against the Special Trustees and their staffs. (7th Report at 79, 83.)

* The Special Trustee serves at the will of the Secretary. (7th Report at 80.)

* The actions of Defendants subordinates and attorneys toward the Special Trustee and his Principal Deputy are unconscionable and smack of retaliation for and obstruction of the Special Trustee's congressionally-mandated oversight duties if not the Court's oversight. (7th Report at 81.)

* The Cobell litigation has allowed DOI and DOJ attorneys to control and influence the Secretaries' decision-making regarding trust reform to support defense of the institution, with the argument that to do otherwise would allow the Plaintiffs to gain some advantage. (7th Report at 83.)

* DOI cannot, and will never be able to, manage the Indian trust without outside, experienced trust management directing the effort with the authority and power to supervise and hold accountable those officials at DOI and its Bureaus working on trust operations and reform. (7th Report at 84.)

CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on May 16, 2002, I served the foregoing Department of the Interior's Response to the Seventh Report of the Court Monitor by facsimile only, in accordance with their written request of October 31, 2001, upon:

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