

**THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

ELOUISE PEPION COBELL, et al.,)	
)	
Plaintiffs,)	
v.)	Civil Action No. 1:96CV01285 (RCL)
)	
GALE NORTON, Secretary of the)	
Interior, et al.,)	
)	
Defendants.)	

**SITE VISIT REPORT OF THE SPECIAL MASTER
TO THE OFFICE OF APPRAISAL SERVICES IN GALLUP, NEW MEXICO
AND THE BUREAU OF INDIAN AFFAIRS NAVAJO REALTY OFFICE
IN WINDOW ROCK, ARIZONA**

On March 6, 2003, the Special Master, in the company of attorneys representing the Department of Justice and the Office of the Solicitor, visited the Office of Appraisal Services (“OAS”) of the Navajo Regional Office (“NRO”) of the Office of the Special Trustee for American Indians (“OST”) located in Gallup, New Mexico and the Bureau of Indian Affairs (“BIA”) Realty Office in Window Rock, Arizona. The purpose of the site visit was to determine whether individual Indian trust information concerning the appraisal of the value of rights-of-way (“ROWS”)¹ and easements running across Navajo allotments was being preserved, maintained, and safeguarded in accordance with Court orders.²

¹ A Right-of-Way (ROW) grant is an authorization to use a specific piece of public land for specific facilities for a specific period of time. Congress authorized grants of ROWs over Indian lands in 1948 legislation. See Act of Feb. 5, 1948, ch. 45, 62 Stat. 17, 25 U.S.C. §§ 323-328. A grant over tribal land requires “consent of the proper tribal officials,” § 324, and the payment of just compensation, § 325, as do ROWs granted over lands of individual Indians. Id. The vast majority of ROWs granted are authorized by Title V of Federal Land Policy And Management Act of 1976 (43 U.S.C. §§ 1761-1771) and Section 28 of the Mineral Leasing Act of 1920, as amended, 43 U.S.C. § 185.

² On February 22, 1999, this Court found defendants Secretary of the Interior Bruce Babbitt, Secretary of the Treasury Robert Rubin, and Department of the Interior Assistant Secretary,

During the site visit, the Special Master examined appraisal files located in the Gallup Regional Appraisal Office and easement files located in the Window Rock BIA Realty Office. The Special Master also interviewed former Chief Appraiser Anson Baker (who was present during the Special Master's site visit),³ Regional Appraiser Robert Hatfield (who was being trained by Baker at the time), and BIA Realty Officer Stephen Graham.

The site visit uncovered several problems. At the outset, Baker admitted to the Special Master that, before he transferred to the OST-OAS-Northwest Regional Appraisal Office in September 2002, he "erased" all of the appraisal information stored on his computer.⁴ He also admitted he was unable to locate "two memoranda," which he utilized to formulate his appraisal

Indian Affairs Kevin Gover to be in civil contempt of the Court's orders of November 27, 1996 and May 4, 1998. Two days later, in accordance with Rule 53 of the Federal Rules of Civil Procedure and with the consent of both parties, this Court appointed the undersigned to serve as special master in this litigation. The Special Master was ordered to "oversee the discovery process in this case to ensure that discovery is conducted in the manner required by the Federal Rules of Civil Procedure." Order dated February 24, 1999, at 2. To fulfill his duties, the Court authorized the Special Master to "do all acts and take all measures necessary or proper for the efficient performance of the master's duties, as set forth in this order." *Id.* Less than six months later, the Court, by consent of the parties, expanded the order of reference to include oversight of "the Interior Department's retention and protection from destruction of IIM Records through, among other things, on-site visits to any location where IIM Records are not being protected from destruction or threatened destruction." *Cobell v. Babbitt*, August 12, 1999 Order at 2. The site visit to the OAS and BIA Realty facilities was undertaken pursuant to these orders.

³ Between 1980 and 2002, Baker served as an appraiser in the BIA Navajo Regional Appraisal Office – the last four as Chief (or Regional/Supervisory) Appraiser. In 2002, Baker was transferred to the Northwest Regional Appraisal Office in Portland, Oregon.

⁴ Baker insisted he "never destroyed any federal documents." As this report focuses primarily on the destruction of trust information in light of the Court's orders and the Secretary's fiduciary responsibilities, it will not examine Baker's inadvertent admission that he may have violated the Federal Records Act, 44 U.S.C. §§ 2101-18, 2901-09, 3101-07, 3301-24.

valuations; that his appraisal workfiles lacked documentation supporting his ROW valuations;⁵ and that based on those valuations, Navajo allottees receive payments for ROWs “much less” than those payments received by neighboring tribes and private landowners. When the Special Master asked Baker why he appraised allottee ROWs at a value lower than the amount paid for ROWs running across private and tribal lands, the Chief Appraiser responded that he did so out of concern that a valuation commensurate with the valuation of private and tribal holdings would invite protracted condemnation proceedings by Oil and Gas (“O&G”) Companies.

At the Window Rock Office of the BIA, Realty Officer Graham asserted Navajo allottees do not receive “the benefit of their bargain,” *i.e.*, ROW payments comparable to those received by similarly situated private and tribal landowners. He also described a process whereby O&G Company representatives – not delegates of the Secretary – contact, negotiate with, and secure the approval of Navajo allottees to the proposed ROWs.

This Report examines these findings and representations in the context of the Court’s orders and the Secretary’s trust responsibilities to maintain a complete and accurate set of appraisal documentation and ensure that the Navajo allottees receive “fair market value” for ROW leases running across their lands.⁶ For the reasons stated below, it is the conclusion of the

⁵ A review by the Special Master of these files confirmed Baker’s statements, as did Baker’s inability to produce any appraisal file containing supporting documentation in response to the Special Master’s express invitation to do so.

⁶ See 25 CFR § 169.12 (Consideration for right-of-way grants) (“Except when waived in writing by the landowners or their representatives as defined in § 169.3 and approved by the Secretary, the consideration for any right-of-way granted or renewed under this Part 169 shall be not less than but not limited to the fair market value of the rights granted, plus severance damages, if any, to the remaining estate. The Secretary shall obtain and advise the landowners of the appraisal information to assist them (the landowner or landowners) in negotiations for a right-of-way or renewal”) (emphasis added).

Special Master that the failure of the Secretary's appraisal-delegates to safeguard appraisal information as required by court order, federal regulation, industry standard, and fiduciary law, has directly harmed Navajo trust beneficiaries by denying them access to information necessary to meaningfully evaluate and potentially challenge the ROW valuation process.

As context for this conclusion, it is necessary to describe the functions of the Office of Appraisal Services and the geographical area served by the Office of the Special Trustee's Regional appraisers. This report will then examine the ROW appraisal reports reviewed by the Special Master in the context of the standards regulating the appraisal industry and the fiduciary duties governing the Secretary and her appraisal-delegates. Finally, this report will focus on the practical consequences of the Secretary's failure to retain and safeguard vital individual Indian trust information.

Office of Appraisal Services

Appraisals performed by OAS are among the functions performed by the BIA Regional Real Estate Services Program ("RESP"). Under this program, BIA oversees more than 16 million acres of Tribal trust, allotted, and government-owned lands. Beginning in June 2002, RESP has operated under the authority of the Office of the Special Trustee.⁷

⁷ See Secretarial Order 3240 (Subject: Realignment of Indian Lands Valuation and Appraisal Functions) ("realign[ing] the Indian lands valuation and appraisal functions from the Bureau of Indian Affairs (BIA) to the Office of the Special Trustee (OST)") (Exhibit 1); December 20, 2001 Letter from former Assistant Secretary - Indian Affairs Hilda Manuel to Patrick Carr, President Indian Educator's Federation, AFT-AFL/CIO (providing "formal notification of the transfer of the Indian lands valuation and appraisal functions currently in the Bureau of Indian Affairs (BIA) to the Office of the Special Trustee for American Indians (OST)"); (Exhibit 2); Memorandum from Director, Bureau of Indian Affairs, Terrence Virden to All Regional Directors (June 25, 2003) ("In June 2002, the Real Estate Appraisal function was transferred from the Bureau of Indian Affairs (BIA) to the Office of the Special Trustee (OST)"). (Exhibit 3.)

In addition to the locations in Gallup, New Mexico and Window Rock, Arizona, the BIA Navajo Region maintains agency offices in Tuba City, Arizona (Western Navajo); Chinle, Arizona (Chinle Agency); Fort Defiance, Arizona (Fort Defiance Agency); Shiprock, New Mexico (Shiprock Agency); and Crownpoint, New Mexico (Eastern Navajo Agency). Although the authority of the Navajo Regional Director to administer O&G leases on Navajo allotted lands was rescinded in November 2000 and re-delegated to the Farmington Indian Minerals Office (FIMO), (see Shii Shi Keyah Association, et al. v. Hodel (Case No. 84-1622M)), the Regional Director maintains authority over all other real property transactions, including ROWs. See Memorandum from M. Sharon Blackwell, Deputy Commissioner - Indian Affairs, to the Regional Director, Navajo Region and FIMO Director (Nov. 28, 2000). (Exhibit 4.)

The Eastern Navajo Agency Real Estate Services Office, “as the trustee to the Navajo Tribe,” has jurisdiction over Navajo lands located in New Mexico, Arizona, and Utah, and is charged with providing “professional and quality services in all areas of realty transactions affecting tribal and individual Indian trust lands and natural resources, through education and management.” Mission Statement of ENARESO (OTRM09646).⁸

⁸ Three months after the Special Master’s site visit, the Secretary consolidated the real estate appraisal functions formerly performed by various agencies under the supervision of the National Business Center. The Secretary’s action was purportedly initiated in response “to long-standing concerns about the management of appraisal functions as documented for several decades in reports issued by Interior’s Inspector General, the General Accounting Office” and by the Appraisal Foundation and an interagency team under the auspices of the Bureau of Land Management.” Press Release, United States Department of the Interior, *Norton Announces Reform of Real Estate Appraisal Function* (June 19, 2003). (Exhibit 5.)

Eastern Navajo Agency

The Navajo Nation occupies the largest Indian reservation in the United States, comprising approximately 16 million acres, or about 25,000 square miles. The Eastern Navajo Region spans approximately 2,806,632 acres of land, including reservation land, tribal trust land, tribal fee land, areas privately owned by Navajo, land belonging to the Canoncito and Alamo Bands, U.S. Government Reserve, public land (leased by the Navajo Tribe and individual Navajo Indians), public land (permitted to individual Navajo Indians by the Bureau of Land Management), New Mexico State Lands (leased by the Navajo Tribe), and individual Indian Allotments that comprise 623,354.21 acres.

The Eastern Navajo Region, also known as the “checkerboard,”⁹ readily lends itself to the instant discussion of missing trust information and its impact on ROW valuations and comparisons, as each pipeline crossing the region invariably runs across private, tribal, and allotted parcels of land.¹⁰

⁹ According to New Mexico Senator Jeff Bingaman, the checkerboard represents

the Federal Government[’s] attempt[] to force Indian people to assimilate by breaking up traditional tribal lands and allotting parcels of the land to individual tribal members. In New Mexico, this policy created what is known as the ‘checkerboard,’ because alternating tracts of land are now owned by individual Navajos, the state, the federal government, or private landowners.

Senator Bingaman, Statement on S. 1315, Senate Committee on Indian Affairs and House Resources Committee (November 4, 1999).

¹⁰ As the attached map indicates, a spider web of pipelines spreads throughout the checkerboard area, originating from the San Juan Basin (the “Basin”) of northwest New Mexico and southwest Colorado. (Exhibit 6.) The Basin is the second-largest gas field in the conterminous U.S., (see http://aapg.confex.com/aapg/rm2002/techprogram/paper_63556.htm), sprawling across 7,800 square miles and currently producing ten percent of the nation’s natural gas production.

ROW Approval Process on Navajo Allotted Lands

Prior to 1985, ROW transactions were processed by the BIA Realty Office in Window Rock, Arizona. In 1985, these transactions were transferred to the Eastern Navajo Agency in Crownpoint, New Mexico. All superintendent positions were later eliminated for the Navajo region,¹¹ and signature authority reverted to Window Rock, except for ROW documents which remained on file at the Eastern Navajo Agency. See Memorandum from Blackwell (Nov. 28, 2000). (Exhibit 4.) Today, as before 1985, all ROW transactions are handled by the BIA Realty Office in Window Rock.

According to Baker and Graham, an O&G Company initiating or renewing a request for a pipeline ROW over allotted land first contacts the BIA Navajo Regional Office and then the individual allottee interest holders to obtain majority approval. Once the O&G Company identifies the interest holders and obtains their consent (via signature or thumb print), it informs the BIA and provides the agency with its own appraisal report valuing the ROW.¹² BIA then submits the O&G Company's appraisal to the OAS for review by either the supervisor or staff appraiser. According to Realty Officer Graham, BIA does not insinuate itself in the process of

¹¹ The five Navajo Region agencies - Chinle, Eastern Navajo, Fort Defiance, Shiprock, and Western Navajo – “are under the supervision of their respective program division heads located in the Navajo Regional Office.” 130 DM 6 (April 21, 2003).

¹² Cf. Memorandum from Eldred Lesensee, Albuquerque Area Office Chief Appraiser to Area Director, Minneapolis Area Office (November 30, 1998) (“As standard practice when submitting a Right of Way application to the BIA Agency, an applicant should provide to the Agency Superintendent an appraisal report supporting his/her offer of consideration. The BIA Agency Superintendent should forward the appraisal report to the BIA Review Appraiser for review and approval prior to negotiations on the consideration”). (Exhibit 7.)

advising or obtaining the approval of the interest holders.¹³

Appraisal Files Reviewed by the Special Master

In addition to reviewing several files at the Gallup and Window Rock offices, the Special Master requested production of two ROW appraisal files. One of these files, generated in response to a request by an [unnamed] Gas Company for a nine-year renewal of a ROW crossing 55 Navajo allotments (“55 Allotment Restricted-Use Appraisal File”), contained the following documents:

- (1) 56 identical (sequentially numbered) single-page “Requests For Real Estate Appraisals generated by Acting Realty Officer Genni Denetsone to the Regional Chief Appraiser;”
- (2) a memorandum from Acting Realty Officer Dale Underwood to Anson Baker requesting an opinion on the [unnamed] Gas Company request;
- (3) a request for appraisal dated September 30, 1977;
- (4) a request for appraisal dated September 13, 1988; and
- (5) 55 identical four-page “Restricted-Use Appraisal” Reports (“55 Allotment Restricted-Use Appraisal Reports”) signed by Chief Appraiser Anson Baker on June 29, 2001.

(Exhibit B - Under Seal.)¹⁴

¹³ Graham attributed Interior’s detachment from the appraisal process to a lack of resources that are necessary to retain the services employees who both understand the appraisal process and are fluent in the Navajo language – the only language spoken by many of the allottees. By way of contrast, BIA representatives actively interface between beneficiaries and those seeking to lease land for agricultural purposes. Typically, BIA field representatives send a “90 Day Letter of Notice for Leasing and Permitting” to each of the allottees that includes a description of the allotment, explains the manner in which the allottee can enter into a valid lease, and informs the allottee that the BIA “has or is in the process of preparing an appraisal of the fair market rental of this tract which will be furnished to you at your request.” (Exhibit A - Under Seal.)

¹⁴ Page One of the 55 Allotment Restricted-Use Appraisal Reports sets out “Assumptions, Limiting Conditions,” and a “Definition of Fair Market Value;” Page Two contains the “Purpose of Appraisal,” “Appraisal Methodology,” “Effective Date of Appraisal,” “Description of Right-

The second ROW appraisal file reviewed by the Special Master contained a request for a 20-year ROW easement running across seven Navajo allotments. (“Seven Allotment Appraisal”). Attached to the request was a “Complete-Summary Appraisal Report,” prepared by the requesting [unnamed] Pipeline Company (and valuing the 50-foot-wide pipeline easement at approximately \$8.94 per rod¹⁵) and a document entitled, “Seven Allotment Review.” (Exhibit C - Under Seal.) Described as a “technical” or “desk” review, the Seven Allotment Review was purportedly generated “to determine if the appraisal report has been written in accordance with those recognized methods and techniques of appraisal that are necessary to produce a credible appraisal.” Seven Allotment Review at 1.

The Special Master’s review of the 55 Allotment Restricted-Use Appraisal File and the Seven Allotment Appraisal File revealed that neither contained any documentation supporting their respective valuations.¹⁶ In the 55 Allotment Restricted Use Appraisal Report, for example, Baker represented that he “researched the real estate market for the comparable going rates being paid for similar right-of-way easements across Navajo Allotment lands,” *id.* at 2, and that based on that research, “the past going rate for similar easements was \$25 to \$40 per rod for 20-year easements across Navajo Allotment lands,” and “[t]he current going rate paid for similar

of-Way Easements Being Renewed,” and “Real Property Interest Appraised and Market Data Used in this Appraisal Report;” Page Three includes a discussion regarding the “Highest and Best Use,” “Market Data Analysis,” “Estimated Marketing Time,” and “Fair Market Value Estimate;” and Page Four consists of a Certification attesting to the signatory’s (*i.e.*, Chief Appraiser Anson Baker’s) objectivity.

¹⁵ A rod is a traditional unit of distance equal to 5.5 yards (16 feet 6 inches or exactly 5.0292 meters. <http://www.unc.edu/~rowlett/units/dictR.html> (June 27, 2003). According to Baker’s calculation, the easement market value estimate by the [unnamed] Pipeline Company’s appraiser amounted to \$5.50 per rod. No explanation of this discrepancy was found in the appraisal file.

¹⁶ Each of the ROW files reviewed on site were equally void of supporting information.

easements is \$25 to \$40 per rod for 20-year easements across Navajo Allotment lands.” *Id.* at 2-3. There is no documentary evidence in the appraisal file, however, substantiating that Baker’s research was actually conducted, confirming past and present market conditions, or identifying the “similar easements” Baker used to formulate his comparisons.

Similarly, in the Seven Allotment Appraisal Report, Baker references his research of historical payments for ROWs across Navajo allotments as well as his “market data research” for “going rates paid.” Noting that, from 1990 to the present, “the going rate paid for R/W easements across Navajo Allotments has been in the range of \$25 to \$40 per rod for a R/W easement with a 20-year term,” Baker opined that the [unnamed] Pipeline Company’s offer of \$40 per rod as the market value payment for this easement “is within and [sic] acceptable rate of market value.” Appraisal Review at 3. Here, too, there is no documentation in the file evidencing any “market data research,” supporting Baker’s assessment of the “going rates paid,” attesting to the range of \$25-40 paid for ROWs, or memorializing the [unnamed] Pipeline Company’s offer of \$40 per rod.

Whether the aforementioned supporting documentation was destroyed, erased, or misplaced is unknown.¹⁷ What is known is that Baker deliberately erased all appraisal information from his computer and inadvertently misplaced at least two appraisal-related

¹⁷ One possibility is that these documents were never generated in the first place. It may be argued that the failure on the part of the Secretary’s appraisal-delegates to generate a complete set of supporting documents constitutes an independent breach of fiduciary duty. See Cobell v. Norton, 240 F.3d 1081, 1105 (D.C. Cir. 2001) (“The government’s broad duty to provide a complete historical accounting to IIM beneficiaries necessarily imposes substantial subsidiary duties on those government officials with responsibility for ensuring that an accounting can and will take place. In particular, it imposes obligations on those who administer the IIM trust lands and funds to, among other things, maintain and complete existing records, recover missing records where possible, and develop plans and procedures sufficient to ensure that all aspects of the accounting process are carried out”) (emphasis added).

documents – all without any awareness that he had violated a Court order or breached any regulations.

As demonstrated below, whatever the cause of the missing information, its absence from the appraisal workfiles constitutes a violation of Court orders, federal guidelines, industry standards, and the Secretary's statutory and common-law obligations to maintain complete files for all transactions affecting trust beneficiaries. More significantly, its absence prejudices individual Indian beneficiaries by rendering them unable to challenge the valuation process that, according to Baker, results in their receipt of materially smaller payments than those received by similarly situated landowners.

The Failure on the Part of the Secretary's Appraisal-Delegates to Retain and Safeguard Complete and Accurate Trust Information Constitutes a Violation of Court Orders

It is undisputed that Baker deliberately erased all his electronic trust information from his computer and misplaced documents upon which his valuations were based. It is similarly undisputed that the Court's orders and directives proscribe such conduct.

On August 12, 1999, the Court directed the defendants to distribute memoranda to all employees ensuring that IIM trust documents are properly preserved and maintained. Order at 2. The August 12 Order explicitly adopted the findings set out in the August 5, 1999 Recommendation and Report of the Special Master Regarding Document Preservation and Protection (August 5 Recommendation and Report), which informed the Court that,

[d]uring the past month, the parties have engaged in extensive negotiations aimed at defining the respective obligations of the Department of the Interior and the Department of the Treasury vis a vis IIM-related records These negotiations have resulted in an agreement between the parties, the terms of which are set out in the Order Regarding Interior Department IIM Records Retention and the Order Regarding Treasury Department IIM Records Retention to which is appended a final list of the predecessors in interest ("Proposed Orders"). These Proposed Orders mandate that the

Department of the Interior and the Department of the Treasury direct all employees charged with maintaining custody of IIM records to retain and preserve IIM-related documents.

August 5 Recommendation and Report at 2 (emphasis added).

Following a lengthy trial that commenced on June 10, 1999, the Court, on December 21, 1999, found Interior and Treasury defendants in violation of their fiduciary obligations to individual Indian beneficiaries. In its opinion, the Court noted that “[d]ocument management is the single biggest issue that must be comprehensively addressed if plaintiffs are to be assured any practical prospective assurance that their trustee will be able to give them an accurate accounting.” Cobell v. Babbitt, 91 F. Supp.2d 1, 9, 14 (D.D.C. 1999).

On this issue, the Court was unequivocal:

Clearly, the destruction of necessary trust documents will make defendants’ statutory task of rendering an accurate accounting impossible. Interior must have a plan (not inconsistent with its declared duty to preserve necessary IIM-related trust documents at least until an accounting is rendered) clearly stating which documents it will keep and which it will destroy, or else plaintiffs will suffer irreparable injury because they will never be able to estimate how much of their own money is in the IIM trust. Accordingly, because a fundamental requirement of defendants’ responsibilities in rendering an accurate accounting is retaining the documents necessary to reach that end, and because Congress has mandated that Interior establish written policies and procedures required to meet that goal, Interior must create and finalize a plan for the proper retention of all IIM-related trust documents necessary to render an accurate accounting.

Cobell v. Babbitt, 91 F.Supp.2d at 43.

Based on this finding, on December 21, 1999, the Court, pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201 and the Administrative Procedure Act, 5 U.S.C. §§ 702 & 706, held that “The Indian Trust Fund Management Reform Act, 25 U.S.C. §§ 162a et seq. & 4011 et seq., requires defendants to retrieve and retain all information concerning the IIM trust that is necessary to render an accurate accounting of all money in the IIM trust held in trust for the

benefit of plaintiffs.” Cobell v. Babbitt, 91 F.Supp.2d at 58.

By erasing, destroying, and misplacing vital ROW appraisal information, Chief Appraiser Baker violated these directives.¹⁸

The Failure on the Part of the Secretary’s Appraisal-Delegates to Retain and Safeguard Complete and Accurate Trust Information Constitutes a Violation of her Fiduciary Duties

Beyond violating Court orders, Baker’s failure, as the Secretary’s appraisal-delegate, to retain and safeguard information, breached the agency’s trust responsibilities toward Navajo allottees with beneficial interests in ROW lands.

It is beyond dispute that the actions of the Secretary, “who serve[s], in [her] official capacit[y], as trustee-delegate[] on behalf of the federal government,” Cobell v. Norton, 240 F.3d 1081, 1085 (D.C. Cir. 2001), are measured by the same standards as those governing private trustees. United States v. Mason, 412 U.S. 391, 398 (1973). She is, as such, bound to keep “all the records and evidence,” Sioux Tribe v. United States, 64 F.Supp. 312, 331 (Ct. Cl.) order vacated Sioux Tribe of Indians v. United States, 329 U.S. 685 (1946) on remand to Sioux Tribe of Indians v. United States, 78 F. Supp. 793 (Ct. Cl. 1948), respond to beneficiaries’ requests for information fully and truthfully, see Restatement (Second) of Trusts § 173 (1959);¹⁹ Restatement

¹⁸ However convenient it might be to cite Baker alone for the destruction, erasure or misplacement of appraisal records, it must be emphasized that the Court directed the Interior Secretary to ensure “that all employees charged with maintaining custody of IIM records [] retain and preserve IIM-related documents.” Order adopting August 5 Report and Recommendation. Based on Baker’s obvious inability to grasp the significance of his actions (he questioned why he should not have erased his computer information prior to being transferred in 2002), it can readily be assumed that he received no direction or instruction concerning his responsibility to preserve trust information.

¹⁹ Restatement (Second) of Trusts § 173 provides:

The trustee is under a duty to the beneficiary to give him upon his request at reasonable times complete and accurate information as to the nature and amount

(Third) of Trusts § 171 cmt. c (2003) (recognizing a trustee's general duty to provide information), and allow beneficiaries to inspect the trust *res*, accounts, and related documents. See 2 Scott Law of Trusts, § 172 (3d ed. 1967); 2 G. Bogert Law of Trusts and Trustees § 970 (rev. 2d ed. 1983). See also Eddy v. Colonial Life Ins. Co., 919 F.2d 747, 750 (D.C. Cir. 1990) (“[t]he duty to disclose material information is the core of a fiduciary's responsibility, animating the common law of trusts” and, “[a]t the request of a beneficiary (and in some circumstances upon his own initiative), a fiduciary must convey complete and correct material information to a beneficiary.”) (emphasis added)’ Security & Exchange Comm. v. Sargent, 229 F.3d 68, 76 (1st Cir. 2000) (recognizing “fiduciary duty to safeguard information relating to” trust).

These heightened responsibilities are directly implicated in the unique fiduciary relationship between the United States and individual Indian beneficiaries. On that score, this Court has held that “[t]he “misplacement” or “erasure” of trust files violates the essence of these responsibilities and constitutes a per se breach of a responsibility deemed ‘undeniable’” Cobell v. Norton, 240 F.3d 1081, 1085 (D.C. Cir. 2001) (citing United States v. Mitchell, 463 U.S. 206, 225 (1983)). See also White Mountain Apache Tribe of Arizona v. United States, 26 Cl.Ct. 446, 449 (1992) (“[t]he trustee's report must contain sufficient information for the beneficiary readily to ascertain whether the trust has been faithfully carried out”).

Here, the failure on the part of the Secretary’s appraisal-delegates to retain and safeguard documentation vital to ROW valuations constitutes a per se breach of these “undeniable”

of the trust property, and to permit him or a person duly authorized by him to inspect the subject matter of the trust and the accounts and vouchers and other documents relating to the trust.

Id.

responsibilities.

The Failure to Maintain and Safeguard Complete and Accurate Trust Information Constitutes a Violation of Agency Directives, Federal Regulations, and Industry Standards

Baker's erasure, destruction, and misplacement of documentary and electronic information supporting appraisal valuations similarly contravenes the principle requiring "appraisals [] conform to established and generally recognized appraisal practices and procedures in common use by professional appraisers engaged in private practice." Real Estate Appraisal Handbook for the Bureau of Indian Affairs (52 BIAM Release 3 (7/31/1979)) ("BIA Appraisal Handbook") at § 1.3 (Policy). These practices and procedures are unequivocal, permit no deviation, and demand all appraisals be "supportable."

The importance of supportable appraisals in the context of individual Indian lands is acknowledged by the agency. On October 31, 2000, former Deputy Commissioner - Indian Affairs M. Sharon Blackwell transmitted a memoranda to all Regional Directors emphasizing the need for supportable appraisals and attaching Advisory Opinion AO-01 (promulgated by the Appraisal Technical Board) establishing "the minimum reporting formats necessary to communicate valuations or evaluations completed for various categories of trust transactions." The BIA Appraisal Handbook explains "[t]he requirement for preparation of supportable estimates of value in appraisal reports is to afford an impartial protection of the common welfare in a manner that will avoid all valid criticism, and to specifically protect the interest of the individual and the Government by presenting factual evidence of equity in all real estate transactions." BIA Real Estate Handbook (52 BIAM 1 (April 16, 1970)). In keeping with that spirit, the agency instructs appraisers that valuations must guide the user "through the logical

sequence of steps the appraiser completes in the process of formulating an opinion of value,” and “[d]iscuss the steps followed in the appraisal analysis[,] [i]ndicat[ing] why certain approaches to value were used while others may have been excluded.” Id. at 7, 8 (emphasis added).

The Code of Federal Regulations places similar emphasis on the need for supportable appraisals and directs that rental determinations of trust lands “be documented, supported, and approved by the authorized officer.” 43 CFR § 2803.1-2 (e)(1) (emphasis added).

The most thorough explication, however, of the duties governing the appraisal process is assembled in the Uniform Standards of Professional Appraisal Practice (“USPAP”), promulgated by the Appraisals Standards Board of The Appraisal Foundation and authorized by Congress as the Source of Appraisal Standards and Appraiser Qualification. USPAP, which sets the minimum standards for appraisal practice in the Federal Government, has been explicitly adopted by the Department of the Interior,²⁰ and, at minimum, requires the Secretary and her

²⁰ Title IX (USPAP) of the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA), entitled “Real Estate Appraisal Reform,” was enacted to address the perception that over-valued appraisals had been partially responsible for the failure of many financial institutions in the 1980s and to address the concern that the absence of meaningful appraisal standards could threaten the future solvency of the federal deposit insurance Company. To that end, Section 1110 of FIRREA required that, at a minimum, all appraisals made in support of “federally related transactions” be in writing and conform to the uniform standards promulgated by the Appraisal Foundation.

On March 16, 1992, the Office of Management and Budget (“OMB”) extended Title IX responsibilities to the Department of the Interior. See OMB Bulletin No. 92-06 (March 16, 1992) to the Heads of Executive Departments and Establishments (directing that “real estate appraisals must be conducted for all federally related real estate transactions [and] [t]hese real estate appraisals must be ‘performed in writing, in accordance with uniform standards, by individuals whose competency has been demonstrated and whose professional conduct will be subject to effective supervision”). See Memorandum from then-Superintendent, Great Plains Agency to Terry Virden, then-Director, BIA Office of Trust Responsibilities (May 29, 1997) (“In an attempt to comply with the Appraisal standards, ethics, and procedures, many of the 12 BIA Chief Appraisers adopted and adapted the USPAP into their appraisal activities.”)

appraisal-delegates to determine and communicate analyses, opinions, and advice in a manner “meaningful and not misleading,”²¹ USPAP (Preamble), and to “prepare a workfile for each assignment” that includes “all other data, information, and documentation necessary to support the appraiser's opinions and conclusions.” USPAP Ethical Rule.²²

Chief Appraiser Baker wholly ignored these standards. The files reviewed by the Special Master revealed no documents suggesting that a “logical sequence of steps” was undertaken and uncovered no “data, information, and documentation” supporting Baker’s opinions and conclusions.

Interior Appraisers are Required to Retain a Complete Set of Supporting Documentation Regardless of Appraisal Format

Baker attributed the lack of information contained in the 55 Allotment Appraisal Report to the fact that it was drafted as a “restricted-use” document – the implication being that less

(emphasis in original); Memorandum from Phoenix Area Director to Superintendent, Western Nevada Agency (Apr. 15, 1997) (“Although none of the standard Bureau of Indian Affairs (BIA) realty actions fall strictly within the scope of FIRREA, most of [the] appraisers took steps to become licensed and/or certified by the July 1991 deadline set forth in Section 1119 of the act”). USPAP has been held out as the benchmark to be applied in the administration of individual trusts. See July 1998 High Level Implementation Plan at 27; February 29, 2000 HLIP at 54.

²¹ There is a distinction between the appraisal and the appraisal report. According to the USPAP, an appraisal is an opinion of value. Standard 1 of USPAP gives the appraiser rules to be used in developing an opinion of value for real property. An appraisal report is the medium used to convey the results of an appraisal to the client. Standard 2 governs this report and its contents.

²² The Dictionary of Real Estate Appraisal (3d ed. 1993) defines appraisal report as:

the written or oral communication of an appraisal; the document transmitted to the client upon completion of an appraisal assignment. Reporting requirements are set forth in the Standards Rules relating to Standards 2 and 5 of the Uniform Standards of Professional Appraisal Practice.

Id. (Emphasis added.)

detail was required.²³ This representation is contrary, however, to federal and industry standards requiring that all appraisal reports rest on a well-maintained and thorough set of supporting information – irrespective of approach or format. USPAP Standard 2 contemplates three types of written appraisal reports: (1) self-contained appraisal reports; (2) summary appraisal reports; and (3) restricted-use appraisal reports.²⁴ The choice between formats,

implies a dialogue between the appraiser and client to define the appraisal problem prior to reaching an agreement to perform an assignment. Part of the definition of the appraisal problem is a decision on which report option is appropriate for the assignment. This dialogue/decision process can be applied to a single assignment or to a series of assignments performed by an appraiser for the same client. In most situations, the client may decide which report option is appropriate for the assignment. The appraiser may

²³ See Bureau of Indian Affairs, Great Lakes Agency, *Guidelines for Real Estate Appraisal and Evaluation Programs* (June 1997) (“A Restricted Report is defined as a specific report within the Great Lakes Agency Appraisal Section which provides a single estimate of value for transaction purposes in which a range in value would not be appropriate. This report type is used in instances such as: gift conveyances, probate estimates, recertifications, easements, exchanges, and similar low impact transactions”). *Id.* at 5, n. 6. (Exhibit 8.) Significantly, the Great Lakes Agency requires restricted reports to contain, among other things, “[d]ocumentation in the preparer’s files [that] support the estimate in value.” *Id.* at 6.

²⁴ A self-contained appraisal report, at one end of the spectrum, represents the most comprehensive type of report; it describes the appraisal process employed and the results of that process. Since this type of report requires the inclusion of all pertinent information regarding the property being valued and the appraisal process, the associated work file need not be extensive.

A summary appraisal report is more abbreviated than a self-contained report – rather than describing the appraisal process used and the results of that process, it “summarizes” this information. Accordingly, where a narrative description of the property under review may consume eight or nine pages in a self-contained report, it may occupy only four or five pages in a summary report.

Finally, a restricted-use appraisal report is the most limited. Unlike the other two, a restricted-use appraisal report is generated for the client’s use only. Whereas the self-contained report “describes” the process and the summary report “summarizes” it, the restricted-use appraisal “states” the appraisal process used and its results. See Advisory Opinion AO-11 (Standards Rule 2-2 Report Comparison Chart). (Exhibit 9.) For this reason, restricted-use appraisal reports are often brief, to be supplemented by relevant detail in the work file.

agree to provide the report option suggested by the client as long as the report option is consistent with the intended use of the appraisal.

Advisory Opinion AO-12. See also 1990 BIA Appraisal Handbook at I.

Regardless of the reporting format used by the appraisers, USPAP Standards Rule 2-1 requires the appraiser to: (1) “clearly and accurately set forth the appraisal in a manner that will not be misleading;” (2) “contain sufficient information to enable the intended users of the appraisal to understand the report properly,” (this requirement emphasizes the need to effectively convey the results of the appraisal investigation); (3) “clearly and accurately disclose any extraordinary assumptions, hypothetical condition, or limiting condition that directly affects the appraisal and indicate its impact upon value;” and (4) “discuss the reason for selecting the approach(es) used in the value estimate as well as the reasons for rejecting any [other].” USPAP Standards Rule 2-2 contains additional specific requirements.²⁵ Foremost, appraisers are

²⁵ Pursuant to USPAP standards, each appraisal report must:

- state the identity of the client, by name or type;
- state the intended use of the appraisal;
- state information sufficient to identify the real estate involved in the appraisal;
- state the real property interest appraised;
- state the purpose of the appraisal, including the type of value, and refer to the definition of value pertinent to the purpose of the assignment;
- state the effective date of the appraisal and the date of the report;
- state the extent of the process of collecting, confirming, and reporting data or refer to an assignment agreement retained in the appraiser's workfile that describes the scope of work to be performed;
- state all assumptions, hypothetical conditions, and limiting conditions that affect the analyses, opinions, and conclusions;
- state the appraisal procedures followed and the value opinion(s) and conclusion(s), and reference the workfile;
- state the use of the real estate existing as of the date of value and the use of the real estate reflected in the appraisal; and, when the purpose of the assignment is market value, state the appraiser's opinion of the highest and best use of the real estate;
- state and explain any permitted departures from applicable specific requirements

cautioned against “using data which is not clearly supported by factual evidence.” USPAP Standards Rule 2-1 (emphasis added).

Baker violated each of these standards. Absent from his appraisal files are any documentation supporting the representation that he considered “fair market value by the Comparable Market Data Approach,” or the “[t]he Income and Cost Approaches.” 55 Allotment Restricted-Use Appraisal Report, at 2.²⁶ Despite representations that “[t]he results of [h]is appraisal relies [sic] upon additional data contained in this appraiser’s files,” *id.*, no such data can be located.

Similarly, the appraisal files reviewed by the Special Master contain no information indicating what methodology the Chief Appraiser used to estimate “fair market value” and whether, in making such a determination, he considered “the highest and best use” of the

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- of Standard 1;
 - state the exclusion of any of the usual valuation approaches;
 - state a prominent use restriction that limits use of the report to the client and warns that the appraiser's opinions and conclusions set forth in the report cannot be understood properly without additional information in the appraiser's workfile; and
 - include a signed certification in accordance with Standards Rule 2-3.

USPAP Standards Rule 2-2.

²⁶ The sales comparison approach rests on the supposition that a prudent individual in an arms-length transaction will pay no more for a given property than the cost of a comparable substitute. Where sufficient information is available for a given market, the use of carefully analyzed and confirmed sales information serves as an indicator of market value because it represents the actions of buyers and sellers in the marketplace. The cost approach typically is applied to improved properties in which the appraiser arrives at a valuation by estimating the cost of reproducing or replacing those improvements; the income approach anticipates future income and capitalizes gross income and expenses into a lump sum present value. Arthur C. Rahn, *Across the Fence Methodology for Valuation of Corridors: What is it and How is it Used?* The Appraisal Journal, July 2001, at 271, 272.

properties and whether this use was “legally permissible, physically possible, financially feasible, and maximally productive,” as required by industry standard. See USPAP Standards Rule 2-2; United States Department of the Interior, U.S. Bureau of Indian Affairs Appraisal Handbook, January 1, 1998; The Dictionary of Real Estate Appraisal, (1993) at 171.

Finally, Baker’s files do not contain any documentation indicating what valuation methods the Chief Appraiser considered (or rejected) in determining “fair market value” of the 55 allotments. See 25 CFR § 169.12.²⁷ The appraisal industry employs several, including the “Across-The-Fence Method,” “Reproduction Cost Method,” “Liquidation Value Method,” and

²⁷ Baker’s conduct, in this regard, also violates Department of Justice Standard A-17 which provides, in pertinent part:

In developing a final value estimate by the sales comparison approach, the appraiser shall explain the comparative weight given to each comparable sale, no matter whether quantitative or qualitative adjustments, or a combination thereof, are used. A comparative adjustment chart, or graph, is recommended and may assist the appraiser in explaining his or her analysis in this regard.

Documentation of each comparable sale shall include the name of the buyer and seller, date of sale, legal description, type of sale instrument, document recording information, price, terms of sale, location, zoning, present use, highest and best use, and a brief physical description of the property.

* * * *

The definition of market value used in these Standards requires that the estimate of value be made in terms of cash or its equivalent. Therefore, the appraiser must make a diligent investigation to determine the financial terms of each comparable sale. When comparing the sale to the property being appraised, the appraiser shall analyze and make appropriate adjustments to any comparable sale that included favorable or unfavorable financing terms as of the date of sale. Such adjustment must reflect the difference between what the comparable sold for with the favorable or unfavorable financing and the price at which it would have sold for cash or its equivalent.

See <http://www.usdoj.gov/enrd/land-ack/data.htm> (emphasis added) (footnotes omitted).

“Alternate Route Method.”²⁸ Baker’s failure to document whether he accepted or rejected these alternatives, (or his destruction or misplacement of these files) calls into question his assessments of the “fair market value” of allottee ROWs.

The consequences of Baker’s conduct are discussed below.

The Lack of Vital Appraisal Information Obscures the Degree to Which ROW Leases Are Valued Less Than Tribal or Private Lands

Both Baker and Graham admitted to Interior’s practice of discounting allottee ROW valuations. The Special Master’s review of OAS’ ROW files reveals that Chief Appraiser Baker valued Navajo allotted ROWs at a “market rate” of \$25-40 per rod. The record before the

²⁸ There are divergent views in the appraisal community as to the best methodology to be employed to achieve the “highest and best use” of a property. One leading expert opines that ROW appraisers should

first estimate the “across the fence” (ATF) value by examining sales of typical properties in the vicinity of a corridor, and then apply an “enhancement factor” or EF (later renamed with a “Corridor Factor”) derived from other corridor sales in relation to their ATFs on the date of sale.

Charles F. Seymour, *The Continuing Evolution of Corridor Appraising (Back to the Basics)*, Right of Way, May/June 2002, at 15-16. (10.)

Another expert suggests that “‘buyer’s market’ prices (aka ‘going prices’ or ‘alternate route’ values). . . offer the closest approximation to the ‘fair market value criterion’ within limited and closed market corridor properties where all transactions are unavoidably one-sided.” *The Capitol Hill Declaration on Corridor Valuation: An Appeal for a Paradigm Shift from Monopolistic to Market Corridor Valuation Methods and Federal Rights-of-Way Rent Schedules*. The Ad Hoc Task Force on Corridor Valuation (December 4, 2001). See also David R. Bolton and Kent A. Sick, *Power Lines and Property Values: The Good, the Bad and the Ugly*, 1998 Institute on Planning, Zoning and Eminent Domain, Municipal Legal Studies Center, The National Quarterly on State and Local Government Law, at 31, n. 2 (Spring 1999) (ATF method inappropriate for telecommunications corridor rights-of-way valuations); Charles P. Buccaria and Robert G. Kuhs, *Fiber Optic Communication Corridor Right of Way Valuation Methodology (A Summary Resulting from Telecommunications Corridor Right of Way Market Observations)*, The Appraisal Journal, April 2002 (“Purchasers or sellers of assembled telecommunication or pipeline corridors do not generally use ATF”).

Special Master confirms that tribes and private landowners receive considerably more.

In March 1998, for example, an [unnamed] Pipeline Company paid Pueblo I \$3,688,008 (or \$575 per rod)²⁹ for a 20-year renewal and option for a 40-foot-wide ROW extending over 20.034 miles and containing 97.14 acres. (Exhibit D - Under Seal.) In March 1995, [unnamed] Pipeline Company agreed to pay Pueblo II \$1,010,000 for a 20-year ROW renewal for a 50-foot-wide pipeline running 14.64 miles (or more than \$215 per rod). (Exhibit E - Under Seal.) In February 1998, [unnamed] Pipeline Company paid Pueblo III \$140 per rod for a 20-year renewal of a gas pipeline, (Exhibit F - Under Seal); on May 10, 1995, Pueblo IV was paid \$231 per rod for a 20-year natural gas pipeline ROW, (Exhibit G - Under Seal); on October 29, 1998, [unnamed] Pipeline Company paid \$199 per rod to Pueblo V for a 10-year petroleum pipeline ROW, (Exhibit H - Under Seal); and on October 29, 1998, [unnamed] Pipeline Company paid \$165 per rod to Pueblo VI for a 20-year gas pipeline ROW. (Exhibit I - Under Seal.) The potential range of loss to Trust beneficiaries is as much as \$170-550 *per rod*.

A review of files at the Land Title and Records Office similarly reveals that private ROW interests yield a greater financial return than interests held by allottees – even when subjected to condemnation proceedings. In 1991, for example, an [unnamed] Pipeline Company filed a Petition for Entry Upon Land against the “Does” in the Eleventh Judicial District County of San Juan, New Mexico. The Pipeline Company sought to “acquire by condemnation the property rights and pipeline easements . . . for the purposes of constructing a natural gas pipeline and for all other purposes in connection with construction of the pipeline.” Pipeline v. Does, 91-[case

²⁹ 20.034 miles = 105782.14 feet = 6,411.04 rods. $\$3,688,000 \div 6411.04 = \575.25 per rod.

number undisclosed] (Complaint at ¶ 7).³⁰ (Exhibit J - Under Seal.) The easement at issue was 2,669.02 feet (161.76 rods) long and 50 feet wide. A six-person jury awarded the Does \$70,000 or \$432 per rod. Pipeline v. Does, 91- [case number undisclosed]/([month] [date] 1995).

In 1991, an [unnamed] Pipeline Company settled its claims in condemnation for \$70,000 against the “Smiths” for a 153.82 rod-length pipeline ROW running across their property, also located in San Juan County, New Mexico. The Smiths received \$455 per rod. (Exhibit K - Under Seal.)

Compared to allotted lands, the values accorded (as indicated by the payments received) private and tribal interests are not insignificant.³¹ Yet Baker’s ROW files contain no documentation explaining the differences in appraised value between allottee and private/tribal lands and how these differences factored into his calculation of “market rates.”

Similarly missing from the ROW files is any documentation supporting Baker’s theory that potential condemnation actions would result in a devaluation of beneficiary ROWs. Baker admitted discounting allottee ROWs appraisals for fear that O&G Companies would initiate condemnation proceedings. At the same time, however, that Baker valued allottee ROWs at \$25-40 per rod, the “Smiths” and “Does” (whose land was also subject to condemnation) were

³⁰ The ROW sought was for a section of pipeline built by [unnamed] Pipeline Company from Bloomfield, New Mexico to Gallup, New Mexico. Pipeline v. Does, 91-[case number undisclosed] (Docketing Statement).

³¹ This disparity must be viewed in the context a 1998 report from the Division of Economic Development revealing that approximately 56 percent of the Navajo live below the poverty level, with a per-capita annual income of \$5,759. <http://www.nnwo.org/nnprofile.htm>. See also <http://www.discip.crdp.accaen.fr/anglais/documents/hillermanfinal/dhnavajo.htm> (determining Navajo income-per-person to be \$4,100 per annum, and that 80 percent of those who live on the reservation lack plumbing, telephones, or electricity).

being compensated at a rate of \$400-per-rod. And while Baker's condemnation theories are not wholly devoid of merit,³² industry standards and fiduciary principles demand that he "state all assumptions, hypothetical conditions, and limiting conditions that affect the analyses, opinions, and conclusions" and that "they be included in the appraisal reports." USPAP Standards Rule 2-2. See also BIA Appraisal Handbook at 11 (an appraiser must "[d]efine assumptions, expectations, and beliefs used in applying factual data and judgments which **are believed appropriate** and plausible but cannot necessarily be expected to change before the "effective date" or completion of the transaction." (emphasis in original)). This, Baker did not do.

Not only does this policy of automatically discounting ROW valuations runs afoul of the Secretary's obligation to ensure that allottees are "justly compensated," see 25 U.S.C. § 325 ("No grant of a right-of-way shall be made without the payment of such compensation as the Secretary of the Interior shall determine to be just"), but also it is exacerbated by the fact that the valuations are undocumented and unsupported.

In short, Baker was obligated to document the suppositions behind his valuations in the ROW appraisal files where they could be scrutinized.³³ Navajo allottees are unable to ascertain

³² With respect to condemnation actions by state authorities, Congress did not afford the same protection to allotted lands (see 25 U.S.C. § 357; Minnesota v. United States, 305 U.S. 382, 388 (1938)) as it did for tribal properties. See United States v. 10.69 Acres of Land, More or Less, in Yakima County, 425 F.2d 317, 318 n.1 (9th Cir. 1970) ("Since the lands involved were unallotted tribal lands held in trust by the United States, it is conceded that the State could not condemn them.").

³³ Beyond this, Baker's automatic devaluation of allotted ROWs due to potential condemnation proceedings ignores a principle of law articulated more than a century ago:

In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties. The inquiry in such cases must be what the property is worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but

whether their property has been discounted by a factor of 20, 50, or 200 when compared to similarly situated tribal and private holdings.

It is to avoid this exact result that appraisers are cautioned, in the first instance, “to avoid assumptions and limiting conditions that are clearly the appraiser's own conclusions” Uniform Appraisal Standards for Federal Land Acquisitions, Section A-7. See also BIA Appraisal Handbook at 11 (“Avoid assumptions and limiting conditions that are the conclusion of the appraiser”). It is also for this reason that the Court entered the August 12, 1999 Order. This loss of supporting appraisal documentation added to Baker’s admission to the Special Master (again, in the presence of Department of Justice and Office of the Solicitor) that, in his more than 20-year tenure as a BIA appraiser, he recalled no instance where Navajo allotted land had actually been condemned, renders his valuation of allottee ROWs, suspect.

with reference to the uses to which it is plainly adapted; that is to say, what it is worth from its availability for valuable use.

Boom Co. v. Patterson, 98 U.S. 407, 408 (1878).

The Boom Co. Court explained that merely because a condemning authority desires to acquire a property right for a certain purpose does not permit it to ignore the property’s potential private market adaptability to that same use in assessing “just compensation.” Id. and “just compensation” in the context of condemnation proceedings, is defined as “the amount of loss for which a property owner is compensated when his or her property is taken.” The Dictionary of Real Estate Appraisal, at 194. In the context of pipeline ROWs, “a condemnor must use the valuation methodology existent in the market for . . . corridor rights of way in justly compensating the owner of property having such uses as its highest and best use.” Charles P. Buccaria and Kuhs, Robert G., *Fiber Optic Communication*, supra, at 19. OAS is charged with determining “fair market value,” a term defined in the condemnation context to mean “the amount of money which a purchaser willing, but not obligated, to buy the property would pay to an owner willing, but not obligated, to sell it, taking into consideration all uses for which the land was suited and might be applied.” Nichols, *The Law of Eminent Domain*, §4.02 (rev. 3d ed. 1992). Here, it is evident that, on at least two occasions, pipeline companies deemed tribal and private landowner property to be 20 times more valuable than Baker had appraised comparable property interests of Indian trust beneficiaries.

The Failure to Retain and Preserve Appraisal Documentation Describing Pipeline Variations Precludes Individual Navajo Beneficiaries From Receiving “Fair Market Value”

In addition, the loss of supporting documentation and computer files obscures the variations between one allotment and renders it impossible to determine whether one allotment should be receiving a greater dividend than another. For example, each one of the 55 Allotment Restricted-Use Appraisal Reports is identical and contains the same description of the pipelines ROWs: “The outer diameter of the natural gas pipelines which will utilize the approximate 30 easements under appraisal range in size from 4 ½ inches to 10 ¾ inches. The width of the right-of-way corridors are either 45 feet wide or 60 feet wide.” Restricted Use Appraisal (55 allotments) at 2.

Missing from the 55 Allotment Appraisal File, however, is any documentation revealing features distinguishing one allotment from another – such as width of the ROW per parcel or length that each ROW crosses each allotment. There is nothing in the file, for example, identifying those allotments over which the pipeline ROW was 45-foot wide and those over which it was 60-foot wide. Without this documentation, it is impossible to assess whether Baker considered the fact that “[e]ach burdened property is unique” and that “[a]n easement across one property will probably reflect a different impact when compared to the impact of an easement acquisition on the subject property.” Albert N. Allen, *The Appraisal of Easements*, Right of Way, November/December 2001, at 45.

One easement, for example, “may involve a 50-foot right-of-way compared to only 30 feet for the subject easement. Another easement may extend diagonally across one property unlike the subject easement that may extend along the property boundary.” *Id.* Baker was

obligated to consider factors such as pipeline length and width when comparing various “units” along the corridor with sales from other properties. Charles F. Seymour, *The Continuing Evolution of Corridor Appraising (Back to the Basics)*, Right of Way, May/June 2002, at 17.³⁴ See also William R. Lang and Brett A. Smith, *Setting Value on a Gas Pipeline Easement*, Right of Way, September/October 1998, (“compensation for a typical easement was based on a percent of the fee simple market value, or on a cost-per-lineal-rod basis³⁵. . . . if the size of gas pipeline being put in were small, compensation would be 50 percent of fee value. However, if it is larger, as in the case with a 36-inch line, compensation should be higher or 75-100 percent of fee value”) (quoting Carl Meyer, Chair of the International Right of Way Association’s Pipeline Committee and Supervisor of the Land and Right of Way Department for ARCO Pipeline Company).³⁶

By Baker’s measure, all allotments receive the same dollar amount per lineal rod regardless of variation in width and length. The failure to generate or preserve documents

³⁴ It is clear, the Chief Appraiser also did not consider: the importance of end points, importance of other points along the corridor, density of development along the corridor, general level of ATF along the corridor, demand for corridor use, availability of a substitute corridor, straightness and curvature, grade (compared to surrounding terrain), the number of parcels that would have to be acquired to assemble a substitute corridor, additional income generated by corridor occupancies, corridor use, other appropriate factors on a case-by-case basis, physical and legal characteristics. Charles F. Seymour, *The Continuing Evolution of Corridor Appraising (Back to the Basics)*, Right of Way, May/June 2002, at 17.

³⁵ Easements on land with significant market value are often paid on a percentage of the fee simple amount while easements in outlying areas are paid by the lineal rod. Compensation by the rod is also typically used for land with market value less than \$1,000 per acre.

³⁶ See Rate and Damage Schedule, The University of Texas System, Feb. 1, 1986, ¶ C (indicating difference in consideration for pipelines under 12", between 12" and 24," and more than 24." (Exhibit 11.)

specifying these variations or revealing the “formula” used by Baker to average the allotment values, renders it impossible for allottees to distinguish the amounts owed on each parcel and to determine whether they are being “justly compensated.”

Automatically Discounting Allottee ROWs Without Adequate Supporting Documentation Denies Individual Indian Beneficiaries “Just Compensation” and Maximum Financial Return

Before the Special Master is a record of allottees, simply by virtue of their beneficiary status, receiving a lesser return for ROWs (and other leases) encumbering their property than other landowners receive.³⁷ For pipeline ROWs running across land across the San Juan Basin,

³⁷ In addition to Baker’s condemnation theory, the recently espoused theories of Ross Swimmer, the newly-appointed Special Trustee for American Indians, suggest that allotted land ROWs are justifiably valued for an amount less than similarly situated private and tribal holdings due to the costs inherent in the government’s involvement in the process.

Swimmer’s testimony on this point warrants repetition in its entirety.

- Q. Would you agree -- to the extent that you know during your tenure as Assistant Secretary of Indian Affairs in the late eighties, did you learn at any point, read any reports, or learn from anybody during your tenure there that there are issues regarding whether or not beneficiaries of the Individual Indian Trust were receiving fair market value for the lease of their lands or the sale of their resources?
- A. You would have to define fair market value, because in the context in which I think you are talking about, if you used it in the non-Indian context, fair market value would mean one thing, and in the Indian trust it might mean something else. And receiving the value of the property given the circumstances, that could be an issue. I am not aware, and I don't have a recall from '85 through '88 specifically about the appraisal issue, if there was one then.
- Q. I see. I actually wasn't talking about appraisals right there. I was actually asking you whether you had heard any issues regarding the payment or failure to pay fair market value on leases, and you don't recall any discussions or reviewing any reports regarding fair market value on Indian lands?
- A. I do not recall.
- Q. And you said that there may be a difference on fair market value on Indian lands and fair market value outside of Indian -- or in the non-Indian context?
- A. Yes.

Q. And in that context, are you talking specifically there about a more recent circumstance where sometimes tribes may set say a grazing fee, a flat fee, or a ceiling so that they -- or a flat amount, sort of set the rates for farming leases and things of that nature, is that what you are referring to in that context?

A. I guess if the tribes did, that could be an example, yes.

Q. Well, what were you thinking of as an example?

A. Well, one of the requirements, a legal requirement, because a lease is to be approved, and it creates a federal action. For instance, it brings all of the other federal actions with it, and if a Secretary is going to approve a surface lease, they have to have a NEPA review, National Environmental Policy Act review.

If I were to value the land next door to that Indian land, same land, identical, I would probably put a higher value on the non-Indian land. The NEPA review in itself, even if it didn't require an environmental assessment, or an environmental impact statement, just the fact that it has to have an exception given on it means that there is going to be some delay in the ability to get that lease. You have the other similar environmental -- the Antiquities Act, and things, that might also come into play with that. And then you, of course, have in these instances the BIA oversight. As a lessee, you are now engaged with the federal government. All of those things taken together have a detrimental value to leasing of the Indian lands, and I think that that has to be considered.

The other thing would be if you looked at another example, if you looked at fractionation, and you are trying to value an individual interest, you may have 100 owners of that lease, and one of the first things that BIA requires, as I understand it, is that they notify the lessee that there is a potential -- I mean lessors, that there is a potential lease for their land. They try to get consent. They try to notify everyone that someone wants to lease this land. And that becomes an impediment to the lessee, potential lessee also, because often times they are required to send out those notices and try to contact those people. So there are a variety of ways in which value may be affected.

Q. And let me take these one by one. You mentioned a number of those that really may affect -- and I think all of the examples that you gave would mean that Indian lands -- or they would seem to justify lesser payments on Indian lands than non-Indian lands, is that a fair statement?

A. You were asking about appraisals.

Q. Yes, lesser value.

A. And I would say if you are going to value land and an appraiser, you would have to consider all of the conditions that might affect that land.

Q. But how does the fact -- let me ask you a question in this regard. You said because you have to deal with the BIA and the Department of the Interior, as I understood your testimony, that that would lessen the value. Did I understand that correctly?

A. No. I said it might affect the value. It could actually lessen the value to a lessee,

Navajo allotted land is valued at \$25-40 per rod; tribal land between \$140-\$575 per rod; and land belonging to private individuals, between \$432 and \$455 per rod. By allowing this disparity to continue unchecked (especially in the absence of all documentary support), denies Navajo allottees not only “just compensation” pursuant to 25 U.S.C. § 325, but a maximization of financial reward from their leasehold interests.

As a matter of law, Navajo allottees, like all beneficiaries, are entitled to receive the “maximum benefit” and return from leases encumbering their land. See Jicarilla Apache Tribe v. Supron Energy Corp, 728 F.2d 1555, 1568 (10th Cir. 1984) (subsequently adopted by the majority of the Tenth Circuit sitting en banc, Jicarilla Apache Tribe v. Supron Energy Corp., 782 F.2d 855 (10th Cir. 1986) (en banc) (per curiam) (in the context of the Indian Mineral Leasing Act, the Secretary “is to ensure that Indian tribes receive the maximum benefit from mineral deposits on their lands”) (emphasis added).³⁸

to a potential lessee.

Q. And why is that?

A. I don't think it could increase it, but I think that it could decrease the value.

Q. And why would that be?

A. Just a matter of bureaucracy. If I can lease the land next door at a comparable price then I would do that rather than lease the Indian land in that condition, because I am having to assume a lot of burden that the federal government brings along with that particular Indian lessee – lessor. And if I were a lessee in the private sector, I would look at that as a potential obstacle to my use of that property, and it could, in my mind, make it worth less given an equal situation where I could go and simply sign a lease with the next door neighbor and not have the conditions of NEPA, and not dealing with multiple owners, and that kind of thing.

Testimony of Ross J. Swimmer, Special Trustee for American Indians (June 23, 2003) 13-17.

³⁸ The duty to maximize the financial return to beneficiaries finds its origin in the government's “power to control and manage the property and affairs” of beneficiaries, Chippewa Indians of Minnesota v. United States, 301 U.S. 358, 375 (1937), and to adhere to the ““stricter standards [that] apply to federal agencies when administering Indian programs”” Cobell v. Norton, 240

Indeed, the proposition that, “[a]s trustee of a trust fund, the United States government undertakes a duty to maximize the trust income,” Ute Indian Tribe of Uintah and Ouray Reservation, Utah v. Hodel, 673 F. Supp. 619, 621 (D.D.C. 1987) (emphasis added), enjoys considerable support. See Fort Berthold Reservation v. United States, 390 F.2d 686, 690 (Ct. Cl. 1968) (“just compensation is understood to mean fair market or full value”) (emphasis added); Klamath & Modoc Tribes v. United States, 436 F.2d 1008, 1015, (1971) (“[T]he criterion is whether Congress in disposing of the property has made a good faith effort to realize its full value for the Indians, whether it has in effect performed the trustee's traditional function of transmuting property into money.”) (emphasis added); Cheyenne-Arapaho Tribes of Indians of Oklahoma v. United States, 512 F.2d 1390, 1394 (Ct. Cl. 1975), reversed for other reasons, Cheyenne-Arapaho Tribe of Indians of Oklahoma v. United States, 5 Cl.Ct. 79 (1984) (The United States is “obligat[ed] to maximize the trust income by prudent investment”) (emphasis added).³⁹

F.3d 1081, 1099 (D.C. Cir. 2001) (quoting Jicarilla Apache Tribe v. Supron Energy Corp., 728 F.2d 1555, 1567 (10th Cir. 1984) (Seymour, J., concurring in part and dissenting in part), adopted as majority opinion as modified en banc, 782 F.2d 855 (10th Cir. 1986)). See also United States v. Mason, 412 U.S. 391, 398 (1973) (“There is no doubt that the United States serves in a fiduciary capacity with respect to these Indians and that, as such, it is duty bound to exercise great care in administering its trust”); Pyramid Lake Paiute Tribe v. Morton, 354 F. Supp. 252 (D.D.C. 1973) (“The vast body of case law which recognizes this trustee obligation is amply complemented by the detailed statutory scheme for Indian affairs set forth in Title 25 of the United States Code. Undertakings with the Indians are to be liberally construed to the benefit of the Indians, and the duty of the Secretary to do so is particularly apparent.”) (footnote omitted).

³⁹ The Minerals Management Service, for its part, has explicitly acknowledged that, with respect to the valuation of gas production from Indian leases, it is responsible “[t]o ensure that Indian mineral lessors receive the maximum revenues from mineral resources on their land consistent with the Secretary of the Interior’s (Secretary) trust responsibility and lease terms.” 64 CFR 43506 (emphasis added).

Yet notwithstanding the foregoing body of precedent, ROWs running across Navajo allotted lands are valued at a rate “much less” than ROWs crossing tribal and private lands. And there is no documentation in any of the files reviewed by the Special Master explaining this discrepancy.

The Failure to Preserve and Retain Vital Appraisal Documentation Precludes Navajo Allottees from Being “Knowledgeable” and “Well Informed” Participants in the ROW Process

The missing information in OAS’ files and computers also impacts Navajo allottees by denying them the information necessary to inform their decisions to accept, reject, or seek advice with respect to solicitations by the O&G Company representatives dispatched by the BIA. Foreclosing access to this information is, foremost, anathema to the fiduciary principle requiring a trustee to disclose “material facts affecting [his or her] interest” when the trustee (1) knows the material facts subject to disclosure; (2) knows that the beneficiary is unaware of those material facts; and (3) determines that the beneficiary should be aware of the information for the beneficiary's own protection. The Restatement (Second) of Trusts, on that score, admonishes a trustee,

to communicate to the beneficiary material facts affecting the interest of the beneficiary which he knows the beneficiary does not know and which the beneficiary needs to know for his protection in dealing with a third person with respect to his interest. Thus, if the beneficiary is about to sell his interest under the trust to a third person and the trustee knows that the beneficiary is ignorant of facts known to the trustee which make the interest of the beneficiary much more valuable than the beneficiary believes it to be the trustee is under a duty to the beneficiary to inform him of such facts.

Restatement (Second) of Trusts § 173 cmt. d (1959).

Beyond this, the loss, erasure, misplacement or failure to generate pertinent appraisal information effectively vitiates the ability of Navajo allottees to meaningfully “consent” to

payments being offered and, arguably, renders any agreement they make with the O&G Companies a nullity. This follows from the well settled proposition that “fair market value” transactions require, at their core, “knowledgeable parties.”

The Bureau of Land Management, for example, in its *Economic Evaluation of Oil and Gas Properties Handbook H-3070-2* (May 27, 1994), cites one of “the salient features of fair market value” as “an arms-length transaction between a knowledgeable buyer and a knowledgeable seller.”⁴⁰ See also *Dictionary of Real Estate Appraisal* (3d ed. 1993) (one of the “fundamental assumptions and conditions” defining “fair market value” is that both “buyer and seller are well-informed and are acting prudently”). *Id.* at 222.

With respect to the valuation of pipeline corridors, market value is considered “[t]he price which a well-informed buyer acting intelligently, voluntarily and without necessity is justified in paying and which a well-informed seller, acting intelligently voluntarily and without necessity is justified in receiving for the property as of the date of the appraisal.” Charles F. Seymour, CRE, MAI, *The Continuing Evolution of Corridor Appraising (Back to the Basics)*, Right of Way, May/June 2002, at 15 (emphasis added). (Exhibit 10.) See also http://www.feldermans.com/Definition_of_market_value.html (“market value” is “[t]he most probable price which a property should bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller, each acting prudently, and knowledgeably and assuming the price is not affected by undue stimulus . . . both parties are well informed or well advised, and each acting in what he considers his own best interest”) (emphasis added).

⁴⁰ In accordance with the market concept, “the price paid for a similar property in an arm’s-length transaction is accepted as the best evidence of fair market value.” *Economic Evaluation of Oil and Gas Properties Handbook H-3070-2*, United States Department of the Interior Bureau of Land Management (Rel. 3-287) (5/27/94) at I-2.

According to the International Association of Assessing Officers, market value is “[t]he most probable price (in terms of money) which a property should bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller each acting prudently and knowledgeably, and assuming the price is not affected by undue stimulus [and where] [b]oth parties are well informed or well advised, and acting in what they consider their best interests”).

See http://www.agecon.purdue.edu/crd/localgov/Second%20Level%20pages/def_market_value.html. (Emphasis added.)

With respect to ROWs running across their lands, Navajo allottees are not “knowledgeable,” “well informed,” or “well advised.”

The Secretary’s failure to provide individual Navajo allottees with vital appraisal information is exacerbated by her failure to retain trained personnel to negotiate with O&G companies on behalf of individual Indian beneficiaries. According to BIA Realty Officer Graham, economic constraints prevent Interior from retaining appropriate personnel to negotiate directly with O&G Companies. This cost-saving measure, however, results in the Secretary’s failure to “obtain and advise the landowners of the appraisal information to assist them (the landowner or landowners) in negotiations for a right-of-way or renewal.” 25 CFR § 16 9.12. See also 45 Fed. Reg. 45910 (1980) (adding the requirement “that the landowners be advised of the valuation information prior to the commencements of negotiations which goes without saying that this is also prior to the obtaining of consents by the prospective grantee of the easement”). Indeed, allowing the O&G Companies to negotiate directly with non-English speaking allottees to avoid the expense of hiring Navajo-speaking mediators, places the Secretary “in a position where it would be for h[er] own benefit to violate h[er] duty to the beneficiaries”). Bussian v.

RJR Nabisco, Inc., 223 F.3d 286, 294-95.⁴¹

In sum, the Secretary abdicated her fiduciary responsibilities when her appraisal-delegate destroyed, erased, misplaced, or failed to generate in the first instance, vital appraisal documents. This, coupled with her forcing beneficiaries to negotiate directly with O&G representatives, renders the allottees unable to meaningfully “consent” to the ROW terms offered by O&G Companies, fully appreciate the degree to which they are receiving “much less” than tribal and individual ROW landowners, and, ultimately, challenge those terms.

As a Result of the Secretary’s Appointment of Incompetent Appraisers Individual Indian Beneficiaries Do Not Receive “Fair Market Value” for ROWs Running Across Their Land

Finally, the appointment of Chief Appraiser Baker raises independent concerns. It is settled that “the Secretary [i]s obligated to act in good faith” in the appointment of commissioners who, in turn, “were obligated to act in good faith in appraising and selling [] lots” on Indian lands. Creek Nation v. United States, 97 Ct. Cl. 602 (1942). Good faith in this context requires nothing less than obtaining full value for Indian land through the imposition of an adequate, competent, and impartial appraisal system. Fort Berthold Reservation v. United

⁴¹ The Secretary’s failure to negotiate directly with the O&G Companies and to allow Company representatives to contact allottees and secure their approvals to ROWs raised concerns explicitly recognized by the Phoenix Area Director who, in 1969, wrote:

[i]rrespective of regulation or policy forbidding such action, it is readily apparent that if the value estimate is revealed, any negotiation that takes place is then from this figure downward. The end result is that something less than fair market of value is received for the landowner because of our failure to negotiate in his behalf. . . . The obligation inherent in this Bureau’s trusteeship is to be assured that the landowner receives fair and just compensation.

Memorandum from Phoenix Area Director to All Superintendents (June 12, 1969) Emphasis added.

States, 390 F.2d 686, 690 (Ct. Cl. 1968). The appraisal system of the Navajo Office of Appraisal Services meets none of these criteria.

The record reveals that Baker: (1) failed to populate appraisal files with necessary supporting documentation; (2) destroyed electronic trust information supporting trust appraisals; (3) misplaced appraisal memoranda; and (4) devalued allottee lands based on unsubstantiated and undocumented assumptions.⁴²

Courts have found trustees in breach of their fiduciary responsibilities for less egregious conduct.⁴³

In Chippewa Indians of Minnesota v. United States, 91 Ct.Cl. 97 (1940), for example, the Court held that timber sold on the basis of appraisals rendered by 35 inexperienced and incompetent appraisers appointed by the Secretary violated the terms and provisions of the Act of January 14, 1889, 25 Stat. 642, requiring the examination of trust lands be “careful, complete, and thorough” and made by “a sufficient number of competent and experienced examiners.” Similarly, a disparity of 33 1/3 percent was held to be an actionable violation of “fair and honorable dealings” under the Indian Claims Commission Act, Nez Perce Tribe v. United States, 176 Ct. Cl. 815 (1966), while a disparity between a \$1.24 payment and a \$3 value per acre was

⁴² Indeed, the duty to safeguard trust documentation is one explicitly acknowledged by the Secretary in her Trust Principles (303 DM 2), which charge the trustee (and her delegates) “with a high degree of care, skill and loyalty . . . [to] [e]stablish and maintain a system of records that permits beneficial owners to obtain information regarding their Indian trust assets in a timely manner and protect the privacy of such information in accordance with applicable statutes.” Id. at ¶ J.

⁴³ “[I]n view of the fiduciary obligation to maximize the trust income by prudent investment,” this jurisdiction has held that “the burden of justifying the conduct is clearly on the trustees.” Blankenship v. Boyle, 329 F. Supp. 1089, 1096 (D.D.C. 1971).

deemed a breach of fiduciary obligation which “may obviously involve conduct less than arbitrary, capricious, or fraudulent by an official charged with the position of trust,” Sac & Fox Tribe v. United States, 167 Ct. Cl. 710, (1964), and a realization of only 38 percent of market value, Miami Tribe v. United States, 150 Ct. Cl. 725 (1960) and the transfer of funds from an account paying 5 percent interest to one earning 4 percent interest were held a breach of fiduciary responsibility. Menominee Tribe of Indians v. United States, 59 F. Supp. 137, 140 (Ct. Cl. 1945).

Conclusion

At the core of the Secretary’s trust responsibilities lies the duty to ensure that individual Indian beneficiaries are justly compensated for ROW leases running across their lands. At the heart of this duty lies the obligation to ensure that the appraisal process is conducted in a manner both competent and beyond professional reproach. For the reasons stated above, the Special Master finds the Secretary and her delegates have abrogated these responsibilities. In derogation of Court order, fiduciary duty, federal regulations, and industry standards, the Office of Appraisal Services has erased, deleted, and misplaced trust information vital to the valuation of ROWs running across Navajo allotted lands.⁴⁴ It is doubtful, as a result, whether Navajo

⁴⁴ Under ERISA, it is settled that even “honest but imprudent” conduct is sufficient grounds for removing a fiduciary. See Brock v. Robbins, 830 F.2d 640, 647-48 (7th Cir.1987) (removal for honest but imprudent conduct); Shaver v. Operating Engineers Local 428 Pension Trust Fund, 332 F.3d 1198, 1204 (9th Cir. 2003) (“On these facts, removal of the trustees might conceivably be warranted, because trustees may be removed for imprudent, but not necessarily improper, conduct”). See also Katsaros v. Cody, 744 F.2d 270, 281 (2d Cir.1984) (as part of the equitable relief associated with removal, the Court may appoint a substitute fiduciary). Indeed, it is difficult to distinguish the equities driving this conclusion in the ERISA context and those attaching to the underlying trust litigation. Compare Brock, *supra*, 830 F.2d at 648 (“imprudent trustees undermine the purpose of ERISA which is to insure that the assets of a fund will be there when the beneficiaries need them,”) with Cobell v. Norton, 240 F.3d 1081, 1103 (D.C. Cir. 2001) (“Contrary to appellants’ claims, . . . the Interior Secretary owes IIM trust beneficiaries an

allottees are receiving “fair market value” for leases encumbering their land. It is certain they are denied the information necessary to make such a determination.

On August 12, 1999, the Court, with the consent of both parties, ordered that, “in the event that the Special Master determines that IIM Records are not being protected from destruction or threatened destruction, he may recommend to the Department that it take reasonable steps to protect IIM Records found to be in jeopardy of destruction. He may also recommend to the Court such remedial action as he deems appropriate pursuant to Rule 53, Federal Rules of Civil Procedure.” The first option, in the view of the Special Master, is of no utility.

accounting for ‘all funds held in trust by the United States for the benefit of an Indian tribe or an individual Indian which are deposited or invested pursuant to the Act of June 24, 1938.’”).

The Special Master, with considerable urgency, recommends the Court intervene and order an immediate formal investigation into Interior's appraisal services and, based on those findings, fashion an appropriate remedy.

Respectfully submitted,

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SPECIAL MASTER