UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action Number 96-1285 (RCL)**
	)	
GALE A. NORTON, Secretary of the Interior, et al.,	)	
	)	
	)	
Defendants.	)	
	)	

MEMORANDUM OPINION
("Fixing the System")

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This is the second of two memorandum opinions issued this date following a forty-four day bench trial. The first opinion dealt with the further relief ordered by this Court relating to the historical accounting owed by defendants to plaintiffs. The present opinion discusses the further relief ordered by the Court relating to the obligation of the Interior defendants to bring themselves into compliance with the fiduciary duties owed to plaintiffs as the trustee-delegate of the United States for the individual Indian money (IIM) trust.

I. PROCEDURAL INTRODUCTION[1]

On October 25, 1994, Congress passed the American Indian Trust Management Reform Act ("the 1994 Act"). The Act established the Office of the Special Trustee for American Indians within the U.S. Department of the Interior. 25 U.S.C. § 4042. It also directed the Special Trustee to

> prepare and, after consultation with Indian tribes and appropriate Indian organizations, submit to the [Interior] Secretary and the Committee on Natural Resources of the House of Representatives and the Committee on Indian Affairs of the Senate, within one year after the initial appointment is made under section 4042(b) of this title, a comprehensive strategic plan for all phases of the trust management business cycle that will ensure proper and efficient discharge of the Secretary's trust responsibilities to Indian tribes and individual Indians in compliance with this chapter.

25 U.S.C. § 4043(a)(1).

In accordance with this provision, the Special Trustee submitted a strategic plan to Interior Secretary Bruce Babbitt and Congress in April of 1997. After reviewing the Special Trustee's strategic plan, Secretary Babbitt issued his own plan in July of 1998, which is known as the High Level Implementation Plan ("HLIP"). The HLIP consisted of twelve subprojects, with a focus on ensuring the accuracy of data retained by Interior regarding the IIM trust fund and developing uniform policies and procedures to guide trust management in the future.[2]

Meanwhile, on June 10, 1996, the named plaintiffs commenced the present action against the

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[1] The companion memorandum opinion issued this date provides a more complete introduction to the present phase of this litigation. The following procedural introduction is intended only to discuss the events relevant to the issuance of relief to bring the Interior defendants into compliance with their fiduciary duties to the beneficiaries of the IIM trust, apart from their duty to account for past activities.

[2] On March 1, 2000, Interior filed a Revised and Updated High Level Implementation Plan with the Court. Since the Revised HLIP supplanted the original, it will be designated "the HLIP" for the remainder of this opinion.

Secretary of the Interior and other federal officials, alleging that the mismanagement of the IIM trust by the Interior and Treasury departments constituted a breach of their fiduciary duties to plaintiffs. On May 5, 1998, the Court bifurcated this action into two distinct phases. Phase I of the litigation, also known as the "fixing the system" phase, would focus on the reforms instigated by defendants to bring the management of the IIM trust into compliance with their fiduciary obligations. This phase is forward-looking, in that it attempts to discern whether defendants have reformed the management of the IIM trust in such a way that will ensure that the United States will honor its fiduciary obligations to the Indian beneficiaries in the future. Phase II, also known as the "historical accounting phase," would focus on the performance of a formal accounting of the IIM trust, as required by the 1994 Act. This phase is backward-looking, in that it attempts to discern whether and to what extent the United States has honored its fiduciary obligations to the Indian beneficiaries from the inception of the trust until the present date.

In 1999, the Court conducted a six-week bench trial addressing plaintiffs' Phase I claims. During the trial, Interior introduced the HLIP into evidence in order to demonstrate that it was taking steps to bring itself into compliance with its fiduciary obligations to the IIM beneficiaries. On December 21, 1999, the Court issued a memorandum opinion containing detailed factual findings and conclusions of law. Cobell v. Babbitt, 91 F. Supp.2d 1 (D.D.C. 1999) ("Cobell V"). The Court determined that

> defendants have the type of historical record of recalcitrance that troubles the court. The court is aware that defendants, especially Interior, [have] made promises similar to those relied upon today each time that it has come up for review on the IIM trust. Indeed, these broken promises are what necessitated the passage of the Trust Fund Management Reform Act. Promises made in court, however, are different than the puffing to Congress that Interior has done over the past few decades. The court can ensure that these promises are kept, and it has the contempt power that will allow it to do so when appropriate.

> Despite defendants' history, the court has decided to give defendants one last opportunity to carry through on their promises. The HLIP, defendants' most comprehensive plan to eventually bring themselves into compliance with their duty to render an accurate accounting, is a substantial step in the right direction, as even plaintiffs admit. This time, there is substance to support defendants' promises. The court feels that it is therefore its constitutional duty to allow defendants the opportunity to cure the breaches of trust declared in this Memorandum Opinion. Given separation of powers concerns, the court will deny for the time being plaintiffs' request to appoint a receiver or Special Master over the IIM trust. Should the court find in the future upon proper motion by plaintiffs that defendants have been less than truthful in their representations or that defendants' adherence to prompt remedial action turns out to have been feigned, then the court may well decide to exercise its authority to ensure that its orders are carried out.

Id. at 54.

On September 17, 2002, following a twenty-nine day bench trial, this Court issued a memorandum opinion finding Interior Secretary Gale Norton and Assistant Interior Secretary of Indian Affairs Neal McCaleb to be in civil contempt of court, in their official capacities, with respect to five specifications.[3] The opinion also explained the necessity for considering further injunctive relief beyond that imposed in the Court's December 21, 1999 opinion:

> It is . . . apparent to the Court that the defendants are no closer today to discharging their fiduciary responsibilities properly than they were during the Phase I trial back in the summer of 1999. At the conclusion of that trial, after the plaintiffs proved that the defendants were in breach of the fiduciary duties that they owe to the 300,000 individual Indian trust beneficiaries, the plaintiffs requested that this Court put the IIM trust under court supervision. The Court declined to grant such relief at that time because it felt that it was its constitutional duty to allow the defendants to correct the breaches declared by the Court and those found in the 1994 Act. Thus, by declaring the trust duties of the defendants and remanding the matter back to the agency, the Court granted the least intrusive form of relief that it could fashion.
>
> In light of the current posture of this case, it is now obvious that this relief was and is insufficient. The recalcitrance exhibited by the Department of Interior in

[3] On July 18, 2003, the D.C. Circuit vacated the order of this Court finding defendants Norton and McCaleb to be in civil contempt of court, and directing these defendants to bear the cost of the expenses and fees incurred by plaintiffs in litigating the second contempt trial. Cobell v. Norton, 334 F.3d 1128, 1150 (D.C. Cir. 2003) ("Cobell VIII").

> complying with the orders of this Court is only surpassed by the incompetence that the agency has shown in administering the IIM trust. Accordingly, the Court concludes that while its factual findings and legal conclusions in the Phase I trial ruling were correct (and will therefore not be disturbed), the relief granted by the Court at that time is no longer adequate. Consistent with this conclusion, the Court has determined that it must now consider granting further injunctive relief with respect to the fixing the system portion of the case and the historical accounting project. The Court's conclusion in this regard is in full accord with the principle that courts should exercise the least possible power adequate to the end proposed. The reason is that there is an equally established axiom that when the least intrusive measures fail to rectify the problems, more intrusive measures are justifiable. Moreover, the D.C. Circuit even explicitly stated that "while th[is] court should (and did) remand to the agency for the proper discharge of its obligations, the court should not abdicate its responsibility to ensure that its instructions are followed. This would seem particularly appropriate where, as here, there is a record of agency recalcitrance and resistance to the fulfillment of its legal duties." At this juncture, it is crystal clear that more than a declaratory judgment is necessary to ensure that the defendants discharge their fiduciary obligations properly.

Cobell v. Norton, 226 F. Supp.2d 1, 147-48 ("Cobell VII") (internal citations and quotation marks omitted).

In light of its conclusion to consider further injunctive relief, the Court scheduled further proceedings to determine whether such additional relief was warranted and, if so, to determine the nature and extent of such relief. Because the Court had already conducted a Phase I trial, and because the time was not ripe to conduct a hearing on Phase II of the litigation, the Court designated these proceedings "the Phase 1.5 Trial," in order to stress their nature as an interim stage of this litigation. It explained that this trial would "encompass additional remedies with respect to the fixing the system portion of this case and approving an approach to conducting a historical accounting of the IIM trust accounts." Id. at 162. Specifically, the Court explained that it planned to enter a structural injunction in this case. Id. at 147 n.154.

The Court directed the Interior defendants to submit two plans to the Court: (1) a plan for

conducting a historical accounting of the IIM trust accounts, and (2) a plan for bringing themselves into compliance with the fiduciary obligations owed to the IIM trust beneficiaries. It stressed that these plans should "describe, in detail, the standards by which they intend to administer the IIM trust accounts, and how their proposed actions would bring them into compliance with those standards." Id. at 148-49. The Court also granted the Treasury Department and plaintiffs leave to file any plan or plans of their own regarding these matters.

On January 6, 2003, the Interior defendants and plaintiffs each submitted two plans to this Court. Interior's Plan for bringing itself into compliance with its fiduciary obligations to the IIM beneficiaries was entitled "Department of the Interior Fiduciary Obligations Compliance Plan" (Defs.' Ex. 1). The plaintiffs' alternative plan was entitled "Plaintiffs' Compliance Action Plan Together with Applicable Trust Standards" (Pls.' Ex. 51).

Interior submitted an additional Plan on March 28, 2003 entitled "Department of the Interior Comprehensive Trust Management Plan" ("the Comprehensive Plan") (Defs.' Ex. 27).[4] As explained by Special Trustee Ross Swimmer during the Phase 1.5 trial, the Comprehensive Plan is intended to replace the HLIP as Interior's comprehensive plan for bringing its management of both the IIM trust and Tribal trusts into compliance with its fiduciary obligations to the beneficiaries of those trusts:

> Q. Now did going to [the Comprehensive Plan] in effect mean starting all over again from square one?
>
> A. Oh, not at all. In fact you will find in the plan the — all of the things that are described in the HLIP are in the business processes or incorporated into the goals and objectives. Obviously what was accomplished at that time in the HLIP also carries through to this

[4] The Comprehensive Plan is available online at http://www.doi.gov/indiantrust/pdf/doi_trust_management_plan.pdf.

plan and to the implementation of it. . . .

THE COURT: Does this replace the HLIP then?

THE WITNESS: It really does. It incorporates those items in the HLIP into this plan, Your Honor.

THE COURT: And what does the January 6th plan do?

THE WITNESS: What the January 6th plan essentially does is to pull out of the Comprehensive Plan the portion of that plan that deals with funds, with just the funds accounting — the collection of the funds, the investment, disbursement of the funds. The Comprehensive Plan includes not only, for instance, the IIM account business but also tribal trust accounts that we have to manage.

Tr., Day 36, PM session (June 25, 2003) at 31:23 - 32:19. At the Court's request, Special Trustee Swimmer demonstrated for the Court the portions of the Comprehensive Plan that corresponded to the twelve subprojects of the HLIP. See Defs.' Ex. 316.

When asked why the Comprehensive Plan had not been filed on January 6, 2003, Special Trustee Swimmer explained: "We were well along on the Comprehensive Trust Management Plan when we were asked by the court to file a fiduciary compliance plan. We more or less broke off from the Comprehensive Trust Management Plan to complete that portion of the work that would deal with the trust funds, which is what we felt our responsibility to report to the court on how we would bring our trust fund management into compliance. " Tr., Day 25, PM session (June 25, 2003) at 48:12-19. Once again, Interior did not follow the Court's instructions. The Court's order of September 17, 2002 included the following provision:

> It is further ORDERED that the Interior defendants shall file with the Court and serve upon plaintiffs a plan for bringing themselves into compliance with the fiduciary obligations that they owe to the IIM beneficiaries. As part of this plan, defendants shall describe, in detail, the

> standards by which they intend to administer the IIM trust accounts, and how their proposed actions would bring them into compliance with those standards. This plan should be filed and served upon completion but no later than January 6, 2003.

Cobell VII, 226 F. Supp.2d at 162. Interior was thus ordered to submit a plan "for bringing themselves into compliance with the fiduciary obligations that they owe to the IIM beneficiaries." The order was not restricted to the submission of a plan for Interior to bring itself into compliance with the fiduciary obligations owed to the IIM beneficiaries merely with respect to the funds in the IIM trust or the accounts in the IIM trust, as opposed to the assets of the IIM trust. Instead, the Court directed Interior to submit a plan to bring itself into compliance with the fiduciary obligations it owes, as the trustee-delegate of the United States, to the beneficiaries of the IIM trust. Indeed, the Court specifically noted that a description of the standards by which Interior intended to administer the IIM accounts, and of how its proposed actions would bring itself into compliance with those standards was merely a "part of this plan," not the plan itself. If Interior considered the order to be unclear or ambiguous, it should have sought clarification from the Court. Instead, in an arrogant and contemptuous manner, Interior improperly misconstrued the Court's order of September 17, 2002.

Nevertheless, the issue has been effectively mooted by Interior's subsequent filing of the Comprehensive Plan, which purports to be a plan for Interior to bring itself into compliance with all of the fiduciary obligations it owes to the beneficiaries of the IIM trust. Accordingly, the Court will treat the Comprehensive Plan as Interior's plan to bring itself into compliance with its fiduciary obligations to the IIM beneficiaries.[5]

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[5] As noted above, portions of the Comprehensive Plan deal with issues relating to Tribal trusts, as opposed to the IIM trust. It should thus be understood that, in the remainder of the opinion, the Court's reference to "the Comprehensive Plan" should be understood as a reference to the

On March 3, 2003, the Court granted leave for the National Congress of American Indians ("NCAI") to file an amicus curiae brief with this Court. The NCAI, which represents the interests of over 250 American Indian tribes and Alaska Native villages, filed its brief the same day.[6]

The Phase 1.5 Trial began on May 1, 2003 and ended on July 8, 2003. The Court heard forty-four days of testimony and received over 500 exhibits into evidence from both parties. Proposed findings of fact and conclusions of law were submitted by both parties on August 4, 2003. On August 27, 2003, the Court granted leave for NCAI to file a second amicus brief with this Court, which was filed the same day. Interior filed a brief in response to the second amicus brief on September 8, 2003.

The Court has weighed all of the evidence presented and fully reviewed the arguments presented by the parties. After analyzing the Plans submitted by the parties and the amici curiae briefs submitted by NCAI, the Court hereby enters these findings of fact and conclusions of law.

II. INTERIOR'S COMPREHENSIVE PLAN

A. Introduction

Interior's Comprehensive Plan is divided into seven chapters: Introduction, Strategic Direction, Business Objectives and Business Profile, Organizational Realignment, Transformation Activities, Trust Reengineering, and Conclusion. The Court will examine each of these chapters separately.

Comprehensive Plan, minus any provisions dealing solely with tribal trust issues, and not with IIM trust issues.

[6] Interior filed a brief in response on March 14, 2003. The Court also granted leave to the InterTribal Monitoring Association for Indian Trust Funds to file an amicus brief in this case regarding the appointment of a receiver on October 18, 2002.

The introductory chapter notes that Interior is "committed to implementing the actions described in this Comprehensive Trust Management Plan." Interior's Comprehensive Plan at 1-1. It provides a brief overview of the history of the IIM trust. It notes that in 1975, Congress passed the Indian Self-Determination and Assistance Act of 1975, Public Law 93-638, codified as amended at 25 U.S.C. §§ 450-458bbb-2 ("Self-Determination Act"). The Self-Determination Act directed the federal government to ensure "maximum Indian participation in the direction, planning, conduct, and administration of educational as well as other federal programs and services to Indian communities so as to render such programs and services more responsive to the needs and desires of those communities." Interior's Comprehensive Plan at 1-5. Interior also notes that Congress subsequently enacted additional laws affording Tribes an even greater degree of autonomy in the management of Tribal trust assets and federal funds spent on behalf of the Tribes.

B. Strategic Direction

The second chapter of Interior's Comprehensive Plan is described as presenting a "strategic direction and goals for Indian trust management. . . emphasiz[ing] achievement of results and set[ting] the strategy for achieving improvements in comprehensive trust management." Id. at 1-2. It opens with Interior's mission statement for Indian trust management: "To perform our fiduciary trust responsibilities to American Indian tribes, individual Indians, and Alaska Natives by incorporating a beneficiary focus and beneficiary participation while providing effective, competent stewardship and management of trust assets." Id. at 2-2. After listing thirteen principles of guidance for discharging Interior's trust responsibilities, the Plan lists six "strategic goals":

1. Beneficiary services that are trusted, accurate, and responsive

2. Tribal self-governance and self-determination that increase participation in managing assets

3. Ownership information that is accurate, timely, and reliable

4. Land and natural resources management that maximizes return while meeting beneficiary desires.

5. Trust fund assets management that meets fiduciary standards

6. Administrative services that
   A. enable and empower the organization and workforce to be an effective fiduciary trustee, and
   B. provide modern, appropriate systems and tools to manage the fiduciary trust.

Id. at 2-6 (footnotes omitted).

C. Business Objectives and Business Profile

The third chapter of Interior's Plan "examines trust management as a business." Id. at 1-2. It begins by listing twenty-six "business objectives" intended to achieve the strategic goals identified in the previous chapter. The Plan then "summarizes the business profile, identifies the business lines, and lays the foundation for the new mode of operations as defined by the business environment model and the service delivery model." Id. at 3-1.

The Plan's "business profile" consists of a list of "key stakeholders involved in producing trust management services." Id. at 3-12. In a table reproduced below, the Plan "further defines the future relationship of each stakeholder to trust management":

Stakeholder	Role as identified in the business environment model
Trustee: Congress[7]	Congress enacts statutes and provides funding. Through the 1994 Reform Act, it established standards for trust management. It receives periodic reports on the implementation of trust management programs.
Trustee Designate: Office of the Secretary	The Secretary provides overall trust direction and principles. The Secretary receives status updates on reform efforts and reports on implementation of programs.
Beneficiaries	Beneficiaries request fiduciary trust services and receive fiduciary trust representation, advice and counsel, information, and payments. They provide lease approvals and information, such as address changes, ownership changes, and family updates.
Custodians	Custodians are financial institutions that settle trades, collect income, and hold securities.
Department of the Treasury	Treasury provides financial services. Lease revenues are submitted to Treasury through various DOI agencies, including MMS, BIA, OST, and tribes under compact and contract.
Lessees	Lessees lease Indian lands. BIA executes and manages the leases. OST accounts for, invests, and disburses income from leases. Funds are held in Treasury.
Office of the Solicitor	Office of the Solicitor provides legal counsel to DOI agencies and participates in probate for members of the Five Civilized Tribes.
Office of the Special Trustee for American Indians (OST)	OST provides financial management and disbursement, beneficiary trust services, and representation for individual Indians and Indian tribes. OST oversees DOI performance of trust management.
Bureau of Indian Affairs (BIA)	BIA provides stewardship and management of land and natural resources for individual Indians and Indian tribes. BIA handles small, noncomplex probate cases internally. BIA also maintains land title ownership information.
Minerals Management Service (MMS)	MMS collects and verifies mineral lease revenue and performs mineral compliance audits. It deposits revenue with the Federal Reserve Bank and posts the data with Treasury, notifies OST for investment purposes, and provides lease-level data to BIA to convert to individual and/or tribal ownership information and ultimate disbursement to beneficiaries.
Bureau of Land Management (BLM)	BLM conducts and submits mineral appraisals, leasing compliance, and contracts for cadastral surveys to BIA as required by law.

[7] As explained below, the United States, not Congress, is the trustee of the IIM trust.

Office of Hearings and Appeals (OHA)	Complex probate cases go to OHA for an order determining heirs and distribution. When a decision is final, estate distribution involving ownership information is forwarded to BIA.
Office of Surface Mining (OSM)	OSM directly regulates all coal mining and reclamation operations on Indian lands under the Indian Land Program Regulations. As the regulatory authority, OSM reviews and approves mining permits and conducts inspection and enforcement activities on Indian lands.
State Counties Cities Taxpayers	State, counties, and cities review and comment on trust land acquisition. Trust land within their jurisdictions impacts them through changes to the tax base and law enforcement jurisdiction.
Individual and tribal Indian associations and interest groups	The associations and interest groups provide insight to Indian requirements, needs, and expectations. DOI maintains public relations with associations, interest groups, and lobbyists to foster communication with the beneficiaries.

Id. at 3-17 to 3-18 (footnote added). The Plan next identifies three "distinct business lines," each representing "a distinct group of products or services for comprehensive trust management and encompass[ing] related processes, products, and services within its scope," and consisting of "common business processes focused on a particular activity." Id. at 3-18. The three business lines are defined as follows:

1. Beneficiary trust representation. Representing the beneficiaries in all matters related to the trust, which requires independent representation on behalf of the beneficiaries.

2. Trust financial management. Managing the receipt, investment, and disbursement of funds generated by Indian assets, as well as record keeping and reporting on fiduciary trust management activities and accounts.

3. Stewardship and management of land and natural resources. Managing the land and natural resource assets of the trust.

Id. After describing the products and services provided through each business line, the Plan next provides a "future service delivery model." This model "identifies the new mode of comprehensive trust

management business operations," and describes the respective roles of the Office of the Special Trustee (OST) and the Bureau of Indian Affairs in such operations. Id. at 3-22.

Section 3.6 of the Plan is entitled "Fiduciary Obligations and Requirements." The Plan asserts that "Interior has examined the requirements applicable to administration of the Individual Indian Monies (IIM) accounts. The primary accounting requirements that Interior must meet is set by the 1994 Act. The Act specifically describes the accounting duties owed by DOI to tribes and individual Indians." Id. at 3-27. After listing the relevant portions of the 1994 Act, the Plan states that

> the 1994 Act requires that certain systems or programs be implemented to achieve the 1994 Act's standards for beneficiary service. It uses terms such as "adequate" and "timely," but the Act generally does not specify the manner in which Interior must structure or operate its accounting programs. Instead, Interior must exercise its best judgment in determining which of myriad ways to operate an accounting program that effectively fulfills the statutory obligations.

Id. at 3-28. In subsection 3.6.2, which is entitled "Fiduciary Trust Management Requirements," the Plan explains that

> Interior looks to a number of sources as guidance to inform its judgment and assess its performance in meeting the 1994 Act's requirements: applicable federal statutes, Interior regulations, the Departmental Manual, [Office of Management and Budget] circulars, Department of the Treasury guidelines, generally accepted accounting and auditing standards, its employees' and consultants' experience and expertise, as well as other sources of relevant fiduciary practices.

Id. The Plan then provides a three-page table listing "some of [the] requirements that may contain provisions affecting the trust management business lines." Id. The reader is then directed to Appendix C of the Plan, which groups the various requirements listed in the table under the business line that they potentially affect.

D. Organizational Realignment

The fourth chapter of the Plan "presents the organizational redesign needed to support the new service delivery model." Id. at 1-3. This chapter sets forth a proposed reorganization of Interior that is described as "vital to [Interior's] multifaceted approach to trust reform." Id. at 4-2. The Plan represents that the result of this reorganization will be to "enhance benefits to trust beneficiaries in the following ways":

- Dedicating personnel to provide consolidated beneficiary services
- Increasing the emphasis on tribal contracting and compacting
- Maintaining staff and conserving monetary resources within BIA and OST
- Improving organizational accountability
- Elevating the profile of Indian economic development
- Grouping organizational functions more efficiently.

Id. at 4-2 to 4-3.

The decision to reorganize was apparently prompted by the recommendations of a "Joint DOI/Tribal Leaders Task Force" in December of 2002. This task force

> ultimately agreed to recommend that Congress establish the position of Undersecretary for Indian Affairs, appointed by the President, confirmed by the Senate, and reporting directly to the Secretary. The Undersecretary would have direct-line authority over all aspects of Indian affairs within DOI. This authority would include coordination of trust reform efforts across the relevant agencies and programs within DOI to ensure these functions are performed in a manner consistent with its trust responsibility. The Office of the Special Trustee for American Indians would be phased out.
>
> The task force also agreed that the Office of Self-Governance and Self-Determination should report directly to the new Undersecretary for Indian Affairs. This arrangement would enhance the ability of tribes interested in moving toward more compacting and contracting to directly provide the services due to Indian beneficiaries. Similarly, the task force agreed that any authorizing legislation would also include the creation of a Director of Trust Accountability, reporting directly to the Undersecretary, who would have day-to-day responsibility for overseeing the trust programs of DOI.
>
> Members of the task force also recommended a restructuring of BIA.

Id. at 4-3. The remainder of the chapter describes the proposed reorganization in greater detail. The primary focus of the reorganization is upon "four primary offices within [Interior that] are critical to reforming comprehensive trust management," the Office of the Assistant Secretary of Indian Affairs; the Office of the Assistant Secretary of Land and Minerals Management; the Office of the Assistant Secretary for Policy, Management and Budget; and the Office of the Special Trustee. Id. at 4-5. The reader is also directed to Appendix D, which provides a table identifying the key roles and responsibilities of bureaus and offices within Interior following the proposed reorganization.

E. Transformation Activities

The fifth chapter "describes the transformation activities required to achieve comprehensive trust management as defined in the previous chapters." Id. at 5-1. Specifically, it lists six "major project components" under which each of the individual activities may be grouped, provides a "project schedule," and lists eight "major risks" anticipated to arise during the implementation process.

The six project components are (1) project planning and management, (2) change/risk management, (3) creation of a vision and strategic plan, (4) organizational development and realignment, (5) trust reengineering, and (6) establishment of a performance management program. Id. at 5-2 to 5-3. Each of these six components are defined, and individual tasks are listed as falling within the purview of each component. The fifth component, trust reengineering, is described at greater length in the Plan's sixth chapter, discussed infra.

The Plan provides a "project schedule" for each of the tasks falling under the purview of the six components. However, this schedule contains no deadlines; instead, it simply describes the status of

various tasks as either "completed," "on-going," or "in-process." Moreover, approximately half of the enumerated tasks are not accompanied by one of these three status designations.

Finally, the chapter lists eight major risks expected to be encountered during the implementation process of the "modernization plan":

1. The strategic and business directors for [comprehensive trust management, or "CTM"] lack sufficient definition and clarity to create the understanding and acceptance of the modernization project.
2. Beneficiaries do not accept the DOI modernization plan.
3. Various major stakeholders disagree on the CTM mission and implied boundaries.
4. Sufficient resources are not available to complete the modernization effort.
5. Organizational revisions do not effectively align with the service delivery model or support achievement of the business objectives, limiting the degree to which service delivery can be improved.
6. Reengineering efforts do not generate the degree of improvement nor integration needed.
7. Information systems do not support the process improvements or the data and record accuracy needed.
8. Desired BIA cultural shift does not occur, hampering efforts to complete the modernization.

Id. at 5-13 to 5-14. A table identifies the potential impact and likelihood of occurrence of each of these eight risks as "low," "medium," or "high." The table also provides a paragraph-length "mitigation strategy" and "project action" for coping with each of the eight identified risks.

F. Trust Reengineering

The Plan's sixth chapter describes in further detail one of the six major project components identified in the previous chapter: trust reengineering. The chapter describes the creation of two models for trust management: the "As-Is Model" and the "To-Be Model."

The As-Is Model is a massive document that was filed with the Court on May 1, 2003. The

Plan describes the purpose of the As-Is Model as "establish[ing] a comprehensive understanding of how trust operations are conducted currently." Id. at 6-3. The As-Is Model identifies and analyzes "eight core processes" of trust management: (1) Probate, (2) Title Services, Acquisition & Disposal, (3) Beneficiary Services, (4) Appraisal, (5) Surface Asset Management, (6) Subsurface Asset Management, (7) Accounting Management, and (8) Cadastral Survey Services. See As-Is Trust Business Model Report at ii-v. The Plan states that the As-Is Model is the result of a yearlong effort beginning in February 2002 and ending in February 2003. Interior's Comprehensive Plan at 6-3.

Unlike the As-Is Model, which is intended to describe how trust management is currently conducted, the stated purpose of the To-Be Model is to provide a comprehensive statement of the manner in which trust management will be conducted after Interior's proposed internal changes. As described by the Plan, the To-Be Model represents "the new integrated transformational design for trust management within DOI. The To-Be model will not only encompass reengineering and designing new Trust business processes; it will also include coordinated improvements and requirements in supporting systems, organizations, training, and personnel requirements, combined with an internal and external communication plan." Id. During the Phase 1.5 trial, Special Trustee Swimmer provided an approximate timeline for implementation of the To-Be Model:

> Q. Now what is the expected time frame for the implementation of these plans?
>
> A. We are expecting to have the "to-be" model for all of the processes completed around March or April of '04. . . .
>
> We will then begin to introduce those. We will actually begin introducing some of this much earlier, but as far as the basic model is concerned, we will start implementing that at each agency, what we call the pilot agencies that we actually start with this year in introducing the trust officer.
>
> We will introduce the models there, and then bring each agency up, literally one

> at a time, until they are — everything is current, everything is working the way that it should, and then expand it out to the other agencies. And by the time that we have implemented the model, we are looking at probably the end of '04, the beginning of '05.

Tr., Day 36, PM session (June 25, 2003) at 47:11- 14, 47:17 - 48:3.[8]

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[8] Cf. Swimmer's testimony during cross-examination:

Q. And when will the to-be plan be completed?

A. The contract with EDS is scheduled to be completed in early 2004 — I think it may be March — following the model and the models for the eight different business processes that would come out of that. During that period of time, from now until then, as those models, business models come out, there is a comparison with the as-is, and then the models are refined to take into consideration those areas that have to have modification because of local anomalies.

So the to-be model should be available to us for the eight business processes sometime before mid-2004. They will be incorporated as they come out. . . .

So it's an ongoing project. There is not a — I cannot give you a completion date. I can say that the modeling will be done, we still start implementing those model practices. Once they are established, we have to develop the — write the policies, procedures, may have some regulatory changes, and, you know, hopefully the process then continues through '04 and we have all of the agencies converted and using the new processes within that year.

Q. So you expect that once the to-be process is established, you will implement it within a year's time?

A. I would say that's ambitious, but it's possible.

Q. And when are — for what fiscal year are you asking for appropriations for the actual implementation of the to-be plan?

A. For the actual implementation of to-be, I believe we have money in the request for the '04 budget, and would anticipate seeing money in there for the '05 budget. Now, there's actually — well, we're actually spending money now, so there's obviously money in the '03 budget.

Q. But that's for the to-be planning, correct?

Swimmer also testified that the completed To-Be Model would include deadlines for "milestones" to be achieved in the implementation of the To-Be Model:

> THE WITNESS: Your Honor, I hope — I hope that this [To-Be] plan that has been put together . . . as you can see from these eight business processes, pretty well incorporates the items of the HLIP, [but] it also gives us a complete road map to the future, and it would be adaptable, hopefully again, to any new secretary that comes in.
>
> It will have included with it mile stones, benchmarks, you know, and a pathway, a road map, if you will, towards success, and that, I think, is what is needed.
>
> THE COURT: When do those come?
>
> THE WITNESS: Those will be developed — they are being developed right now, in fact, and they will be more fully developed as we get to the "to-be" process, because each one of these processes that gets changed carries with it the responsibility for the managers to give us the time lines, and the responsible parties to implement, and the work that has to be done to get there.
>
> THE COURT: So by the end of this administration they will be ready?
>
> THE WITNESS: They will be accountable. I believe they will be accountable, and I believe it will be before the end of the administration.

Tr., Day 36, PM session (June 25, 2003) at 39:2-24.

G. Conclusion

The final chapter of the Plan provides a one-page synopsis of the Plan's goals. It also states that the implementation of the Plan will take approximately fourteen months after the To-Be Model is

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A. Right. Yes. You said for the implementation. It would be '04 and '05.

Tr., Day 38, AM session (June 27, 2003) at 80:8-19, 81:1-22.

completed. Interior's Comprehensive Plan at 7-3. After the Plan is implemented, "the reengineered processes will take effect and the applicable technology, policies and procedures, guidelines and handbooks will be developed. At that time it may become reasonable to forecast a date for the termination of the Office of the Special Trustee." Id.

Before determining whether to adopt Interior's Comprehensive Plan, the Court will analyze both plaintiffs' responses and the critique of the Plan contained in NCAI's amici briefs.[9]

III. PLAINTIFFS' RESPONSE

A. Plaintiffs' Opposition Brief

On January 31, 2003, plaintiffs submitted a brief in opposition to Interior's January 6, 2003 Compliance Plan. Plaintiffs first observed that Interior's Plan purported only to state how Interior intended to bring itself into compliance "with certain fiduciary obligations" to the IIM beneficiaries. Pls.' Opp. to the "Fiduciary Obligations Compliance Plan" of Interior Secretary Gale Norton and Acting Assistant Secretary Aureen [sic] Martin at 2-3 ("Pls.' Opp. Br."). As noted above, however, this problem has been effectively remedied by the subsequent filing of Interior's Comprehensive Plan, which purports to be a plan for Interior to bring itself into compliance with all of the fiduciary obligations it owes to the beneficiaries of the IIM trust.

Plaintiffs also observe that "[n]owhere in [Interior's] Plan are common law standards and duties

[9] It should be noted that both plaintiffs' responses and the first NCAI amicus brief were filed prior to the issuance of Interior's Comprehensive Plan. Therefore, the critique contained in both plaintiffs' responses and in the amicus brief is of the January 6, 2003 Plan submitted by Interior, not the Comprehensive Plan.

addressed." Id. at 6. They note that this omission appears to run counter to the admonition of the D.C. Circuit that "[c]ourts must infer that Congress intended to impose on trustees traditional fiduciary duties unless Congress has unequivocally expressed an intent to the contrary. Much as the Supreme Court has regularly turned to the Restatement and other authorities to construe trust responsibilities, it is appropriate for the district court to consult similar sources." Cobell v. Norton, 240 F.3d 1081, 1099 (D.C. Cir. 2001) ("Cobell VI") (internal citation and punctuation omitted).

B. Plaintiffs' Proposed Alternative Plan

As noted above, on September 17, 2002, this Court granted plaintiffs leave to file a plan of their own to bring Interior into compliance with the fiduciary obligations it owes to the IIM beneficiaries. The plaintiffs' plan, filed on January 6, 2003, begins by identifying eight duties traditionally imposed upon trustees at common law. Plaintiffs' Compliance Action Plan Together with Applicable Trust Standards ("Plaintiffs' Compliance Plan") at 16-26. These are the duties of loyalty, administration, impartiality, prudent investment, control and protection of the trust property, keeping property separate and maintaining adequate records, enforcing and defending claims against the trust, and furnishing information. Plaintiffs observe that the provisions of the 1994 Act are not inconsistent with these duties. Id. at 26-29.

Additionally, plaintiffs cite Secretarial Order No. 3215, which was issued by former Interior Secretary Bruce Babbitt on April 28, 2000. Secretary Babbitt explained that the purpose of the order, which is entitled "Principles for the Discharge of the Secretary's Trust Responsibility," was

> to provide guidance to the employees of the Department of the Interior who are responsible for

> carrying out the Secretary's trust responsibility as it pertains to Indian trust assets. All Departmental regulations, policy statements, instructions, or manuals regarding the discharge of the Secretary's trust responsibility shall be interpreted or developed using these trust principles. In addition, these principles provide guidance to all persons who manage Indian trust assets.

U.S. Dep't of Interior, Office of the Sec'y, Order No. 3215 (April 28, 2000), available at http://elips.doi.gov/elips/sec_orders/html_orders/3215.htm. While noting that the 1994 Act had provided "[t]he most comprehensive and informative legislative statement of Secretarial duties in regard to the trust responsibility of the United States," the order nevertheless acknowledged:

> As stated in the Reform Act, this list of duties is not exhaustive. Therefore, to understand the nature of the Department's duties, we must look to a variety of other sources for guidance. One internal Departmental source of guidance is legal advice from the Solicitor's Office. The Solicitor's Office continues to provide the Department with guidance through formal and informal legal advice regarding its trust responsibility. The most comprehensive document available on this subject is a letter by Solicitor Krulitz dated November 21, 1978, analyzing the federal government's responsibility concerning Indian property interests. This legal guidance from the Solicitor's Office informs our interpretation of the duties required by treaties, statutes, and Executive orders.

Id. (quoted in Plaintiffs' Compliance Plan at 29).[10]

The November 21, 1978 letter referred to is addressed to Assistant Attorney General James Moorman from Interior Solicitor Leo Krulitz. Solicitor Krulitz explained to the assistant attorney general that the purpose of the letter was to "set forth . . . this Department's view of the legal obligations of the United States, as defined by the courts, with respect to Indian property interests." Letter from Interior Solicitor Leo Krulitz to Assistant Attorney General James Moorman 1 (Nov. 21,

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[10] A manual used by the Office of the Special Trustee incorporates this paragraph from Secretary Babbitt's order in its entirety, with some minor stylistic modifications. See Office of the Special Trustee for American Indians, Risk Management Handbook for Indian Trust Operations 6 (Jan. 5, 2001), available at http://www.ost.doi.gov/riskmanagement.pdf. An appendix quotes the order in its entirety. See id. at 158-60.

1978) ("Krulitz Letter") (Pls.' Ex. 88). He then summarized his legal conclusions:

1. There is a legally enforceable trust obligation owed by the United States Government to American Indian tribes. This obligation originated in the course of dealings between the government and the Indians and is reflected in the treaties, agreements, and statutes pertaining to Indians.

2. While Congress has broad authority over Indian affairs, its actions on behalf of Indians are subject to Constitutional limitations (such as the Fifth Amendment), and must be "tied rationally" to the government's trust obligation; however, in its exercise of other powers, Congress may act contrary to the Indians' best interests.

3. The trust responsibility doctrine imposes fiduciary standards on the conduct of the executive. The government has fiduciary duties of care and loyalty, to make trust property income productive, to enforce reasonable claims on behalf of Indians, and to take affirmative action to preserve trust property.

4. Executive branch officials have discretion to determine the best means to carry out their responsibilities to the Indians, but only Congress has the power to set policy objectives contrary to the best interests of the Indians.

5. These standards operate to limit the discretion not only of the Secretary of the Interior but also of the Attorney General and other executive branch officials.

Id. at 2 (emphasis added). Notably, Solicitor Krulitz observed that "the decided cases strongly suggest that the trust obligation of the United States exists apart from specific statutes, treaties or agreements." Id. at 9 (citing cases).

Plaintiffs also cite an April 3, 1996 memorandum from Associate Interior Solicitor Robert Anderson to Special Trustee Paul Homan regarding "Legal Issues Pertaining to DOI's Trust Fund Management Responsibilities and OST Reform Efforts." Memorandum from Associate Interior Solicitor Robert Anderson to Special Trustee Paul Homan 1 (April 3, 1996) ("Anderson Memorandum") (Pls.' Ex. 60). Anderson explained that his purpose in drafting the memorandum was to respond to three questions that Special Trustee Homan had directed to the Solicitor's Office.

Homan's third question was: "Please provide me with a list of the Secretary's trust responsibilities to Indian tribes and individual Indians with cites to relevant statutes, regulations, rulings and any other information that may be useful on this subject. In answering this please summarize what the [Office of the Solicitor] considers the specific applicable fiduciary standard to be in each circumstance." Id. at 9 (internal citation omitted). Anderson began his response by observing:

> It is unquestioned that the United States has a trust responsibility with respect to the administration of Indian trust money and assets, and that this responsibility carries with it the fiduciary duties attendant to a trust relationship. The Government's trust obligations arise whenever the United States exercises sufficient control over, or management of trust property or trust money of Indian tribes or individual Indians that the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the tribe or individual Indian), and a trust corpus (timber, lands, funds, etc.).

Id. (citation omitted). Anderson continued:

> The courts have also applied common law standards to supplement the various statutes and regulations in defining the United States' fiduciary obligations; as stated by the Claims Court in [Menominee Tribe of Indians v. United States, 101 Ct. Cl. 10, 21 (1944)], the Secretary, "under a duty to act in harmony with the Government's position as a fiduciary," was not limited in his duty by the statutes under which he acted. The courts have also stated that where the United States holds trust funds in the United States Treasury, the United States, in effect, borrows those funds from the tribal or individual Indian trust beneficiary, imposing a "doubly strict" fiduciary standard prohibiting the United States from profiting at the expense of the trust beneficiaries."

Id. at 13 (citations omitted). Anderson then concluded:

> Applying general trust principles in the context of the duties imposed by statutes, treaties, and regulations, the courts have held that the Government's trust obligations include the following affirmative duties:
>
> - to exercise such care, diligence and skill in managing and dealing with the trust property as a man of ordinary prudence would exercise in dealing with his own property.
>
> - to administer trust resources solely in the interest of the beneficiary, so that any profits gained through administration of the trust accrue to the beneficiary.

- to avoid making expenditures from an account bearing a high rate of interest when money is available for such expenditures from accounts bearing a lesser rate of interest, and also, to avoid repaying expenditures from an account bearing a high rate of interest into an account bearing a lesser rate.

- to promptly place trust income into interest-bearing accounts.

- to maximize trust income by prudent investment. This includes a duty to invest tribal funds in equally safe Government securities yielding a rate of return higher than the Treasury rate, as opposed to simply depositing the funds in the Treasury where they earn the statutorily-mandated four percent interest rate.

- to keep informed so that when a previously proper investment becomes improper, perhaps because of the opportunity for better (and equally safe) investment elsewhere, funds can be reinvested.

- to make expenditures from trust funds only as authorized by law, and then, only for the direct and exclusive benefit of the Indian or tribal owner.

Id. at 14 (citations omitted).

Plaintiffs conclude their Plan by presenting a list of proposed measures for Interior to undertake that (plaintiffs assert) would bring Interior into compliance with the duties plaintiffs have identified. Chief among these measures is the "appoint[ment of a] new and independent trust administration management solely to administer the Individual Indian Trust." Plaintiffs' Compliance Plan at 33. Plaintiffs enumerate a list of recommended personnel to serve in their proposed management scheme, and provide a description of recommended tasks to be undertaken by these new personnel in order to bring Interior into compliance with its fiduciary duties to the IIM beneficiaries.

Plaintiffs' recommendations overlap to some degree with the recommendation contained in the amici briefs submitted by the National Congress of American Indians. Accordingly, before discussing plaintiffs' recommendations, the Court will analyze the recommendations contained in those amici briefs.

IV. THE INTERESTS OF THE AMERICAN INDIAN TRIBES

A. Introduction

The National Congress of American Indians (NCAI), established in 1944, is the oldest and largest national organization of American Indian and Alaska Native tribal governments, and includes among its members most of the major tribes of the United States. Br. for Amicus Curiae National Congress of American Indians ("First Amicus Brief") at 1, 3. In its March 3, 2003 amicus brief, NCAI explains its reasons for proceeding as amicus curiae in the present case:

> The Cobell case involves two parties — the federal government and a class of individual Indians. The individual Indians have grievances with respect to how their money in IIM accounts has been handled by the BIA. Indian tribes are not represented in this litigation, yet are key participants in and beneficiaries of the federal trust system. They have governmental authority on trust lands, a unique trust and treaty relationship with the federal government, and a primary management role over land and natural resources and other programs under federal law. Our purpose in this brief is to inform the Court of tribal interests not represented by the parties, and to ask the Court to avoid any unintended harm to these interests that may occur in the process of fashioning remedies to ensure DOI compliance with its responsibilities to the individual beneficiaries.

Id. at 1-2 (emphasis in original). The Court concludes that although NCAI is not a party to the present litigation, the Indian Tribes possess a substantial interest in avoiding unintended harm that could arise from the issuance of structural injunctive relief in the present case. As NCAI points out:

> In addition to trust money accounts, the tribal interests in trust land and natural resources . . . are physically intermingled and recorded in the same title and ownership systems as the individual interests. In fact, in many instances, tribes and individuals hold undivided property interests in the same parcel of land. Sometimes individuals own the surface rights, and tribes own the subsurface rights under the same parcel. Additionally, tribal and individual resources are often managed and leased in large units under the same leasing and contractual agreements. In short, with respect to land and natural resources, tribal governments have a keen financial and management interest in the decisions of this Court that may affect the functioning of the common Indian trust systems.

Id. at 5. It is routine for trial courts to take into account the rights of third parties to a proceeding before issuing injunctive relief. Indeed, one of the factors to be weighed in determining whether to issue such relief is whether the injury to the plaintiff if the injunction is not granted outweighs the injury to other interested parties who will be affected by the injunction. See Al-Fayed v. CIA, 254 F.3d 300, 303 (D.C. Cir. 2001); George Washington Univ. v. District of Columbia, 148 F. Supp.2d 15, 17 (D.D.C. 2001). It has been well-observed that "[f]or a party in our legal system to be bound by a judicial decree without ever having a chance to be heard is obviously an anomaly." Douglas Laycock, Consent Decrees Without Consent: The Rights of Nonconsenting Third Parties, 1987 U. CHI. L.F. 103, 153. Additionally, one of the seminal articles on institutional reform litigation notes:

> Remedies in institutional relief cases necessarily affect the interests of persons who are neither plaintiffs nor defendants, but who are related in some way to the defendant institution. Since the institution functions through a complex interrelationship of individuals, modification of any practice for the benefit of one deprived group cannot be accomplished without changing the duties or benefits of various other groups. . . . The task of assuring adequate representation of other affected parties. . . is committed largely to the initiative of the court.

Robert E. Buckholz, Jr., et al., Special Project: The Remedial Process in Institutional Reform Litigation, 78 COLUM. L. REV. 784 (1978) (footnote omitted). Therefore, the Court will analyze carefully the assertions and recommendations contained in NCAI's amicus brief.

NCAI explains that

> [o]n November 15, 2002, NCAI member tribes passed a resolution supporting the filing of an amicus brief herein to present five fundamental trust reform principles to assist this Court in fashioning relief that will not infringe upon tribal sovereign authority or diminish the broad federal trust responsibility to the tribes. Amicus NCAI respectfully calls upon the Court to allow the plaintiffs relief consistent with the following five fundamental trust reform principles:
>
> (1) that the Indian trust fund management be governed by clear and enforceable standards, with an express right of compensation for trust mismanagement, and

independent review of trust management activity;

(2) that a primary trust responsibility of the United States is to protect the governing authority of Indian tribes, including the ability of tribes to regulate land use and resource management within their own reservations as well as the right to manage trust assets and accounts through self-determination contracts and compacts;

(3) that reform of the United States' Indian trust fund management not reprogram funds from vitally needed BIA services and not create new levels of bureaucracy that would impede the delivery of trust services to local needs;

(4) that trust reform provide for increased tribal control over land and resources along with a federal system that provides oversight and technical assistance in flexible arrangements driven by the unique circumstances of each reservation; and,

(5) that tribal governments be intimately involved in developing new systems and policies for trust management, with consultation taking place in a manner that ensures that tribal issues are actively addressed.

Id. at 6-7 (internal citation omitted). The Court will separately analyze each of these principles, together with NCAI's recommended actions for compliance with each of them.

B. Clear and Enforceable Standards for Trust Management

The first fundamental trust reform principle identified by NCAI is that "Indian trust fund management be governed by clear and enforceable standards, with an express right of compensation for trust mismanagement, and independent review of trust management activity." Id. at 10. NCAI explains the reasoning behind this principle:

> Even though the courts have held that the United States' fiduciary duty to tribal and individual beneficiaries is subject to the most exacting fiduciary standards, the Government's mismanagement of trust funds and assets has suffered from substantial lack of proper management and accountability. Establishing accountability lies at the heart of trust reform.

> Defining a comprehensive set of meaningful standards that can be used to hold the trustee accountable and measure performance will be essential for trust reform.

Id. at 11 (internal citations omitted). NCAI agrees with plaintiffs that the fiduciary duties of trustees defined at common law govern the administration of the IIM trust:

> Establishing standards is not difficult, in principle, because there already exists a large body of statutory and court-made law defining the standards for performance of trust management and accounting. Of course, in general, fiduciary trust duties and applicable trust standards apply as defined by the trust instrument and relevant statutory environment. But to the extent such duties are not spelled out or negated within the trust instrument or relevant statutes, the well-established equitable principles of court-made trust law apply.

Id. (citations omitted). Interior, however, disagrees that these common-law standards govern the administration of the IIM trust. Inasmuch as this Court directed Interior to submit a plan to bring itself into compliance with the fiduciary obligations it owes to the beneficiaries of the IIM trust, it will be necessary first to determine the precise nature of those fiduciary obligations. Therefore, before proceeding to examine NCAI's recommendations for actions to be adopted in accordance with its first principle, the Court must address the applicability of common-law trust standards to the IIM trust.

1. Testimony of Professor Langbein

In support of its argument that the duties imposed upon trustees at common law do not apply to Interior, in its capacity as trustee-delegate of the IIM trust, Interior presented the testimony of Professor John Langbein of Yale Law School. Professor Langbein testified that the various Restatements of the law of trusts represent the culmination of

> an effort on the part of the [R]estatement writers, the reporter, the advisors, and the members of the [American Law Institute] who deliberate and vote on it, to capture the background law of trust, most of which is default law in the sense that the particular trust instrument can alter it.

> Therefore, it is a body of law that applies in the absence of more particular direction from the [settlor] in the trust instrument.

Tr., Day 19, PM session (June 2, 2003) at 41:7-15. He further observed that "there are a large number of important points of difference" between the IIM trust and a privately-run trust. Id. at 58:9-10. Professor Langbein enumerated at least nine differences that the IIM trust has from a private trust, including: Congress is the settlor of the IIM trust and therefore, there is no ordinary trust instrument for the IIM trust — rather, the trust terms are contained in statutes; a government agency serves as the trustee; the IIM trust is massively underdiversified, in that the trust corpus is virtually all real estate; congressional appropriations fund the trust's administration, rather than a fee charged to the trust beneficiaries; the IIM trust has had exceptional longevity; no outside regulatory agency regulates the IIM trust; the trustee of the IIM trust may not resign; some assets of the trust may be directly managed by IIM beneficiaries through "direct pay" agreements; and Indian Tribes administer certain aspects of trust operation at the local level. See id. at 58:7 - 76:25.

Professor Langbein also stated that, in his opinion, the terms of the "trust instrument" of the IIM trust were also to be contained in appropriations legislation:

> Q. [When you say that the IIM trust terms are contained in statutes,] [w]hat statute[s] are you referring to?
>
> A. There is a series of enactments of one or another of the — of this court's opinions and the Court of Appeals opinions, both trace these back quite some distance. [The] Dawes Act and so forth, and then trace them forward. And, of course, most prominently with respect to these accounting issues includes the '94 statute.
>
> Q. Okay.
>
> A. I would also say, however, that it includes appropriation legislation, or budget legislation, which has the terms of altering the terms of the trust. That is to say, if

> Congress passes a budget appropriation that gives you inadequate funds to carry out something that Congress has earlier said you should carry out, that is the same thing as if Congress says, we hereby amend the trust to order you not to carry out the earlier duty.
>
> So I treat — I treat funding decision[s] as trust terms when applied to a governmentally funded trustee.

Id. at 59:13 - 60:6.

Interior relies almost solely on the testimony of Professor Langbein for its conclusion that the traditional common-law trustee duties do not govern the administration of the IIM trust. However, with a single exception, it is not Professor Langbein's testimony that the Court finds fault with, but with the idiosyncratic conclusions that Interior purports to have deduced from his testimony.

First, the Court agrees with Professor Langbein's conclusion that the law of trusts, the most authoritative statement of which is contained in the Restatement of Trusts, Second and the third Restatement of the Law of Trusts, constitutes default law.[11] However, the Restatement, Third makes clear that this default law governs trusts created by statutes, where the statutes are silent:

> g. Trusts created by statute. Some forms of trusts that are created by statute, especially public retirement systems or pension funds, and sometimes public land trusts, school land trusts, or trusts for benefit of native populations, are administered as express trusts, the terms of which are either set forth in the statute or are supplied by the default rules of general trust law.

Restatement, Third § 4 cmt. g (emphasis added) (internal citation omitted). Moreover, as the D.C. Circuit recognized in Cobell VI, a trustee must satisfy a heavy burden to overcome the

[11] In 1957, the Restatement of Trusts, Second ("Restatement, Second") was completed, superseding The Restatement of the American Law of Trusts, which had been published in 1935. In 2003, the first two volumes of the third Restatement of the Law of Trusts ("Restatement, Third") were issued. At the time that this opinion was issued, the remaining volumes of the Restatement, Third had not yet been published.

application of that default law:

> While the government's obligations are rooted in and outlined by the relevant statutes and treaties, they are largely defined in traditional equitable terms. Where Congress uses terms that have accumulated settled meaning under either equity or the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms. Courts must infer that Congress intended to impose on trustees traditional fiduciary duties unless Congress has unequivocally expressed an intent to the contrary. Much as the Supreme Court has regularly turned to the Restatement and other authorities to construe trust responsibilities, it is appropriate for the district court to consult similar sources.

Cobell VI, 240 F.3d at 159 (emphasis added) (internal citations and punctuation omitted).[12] In other words, in order to overcome the inference that Congress intended to impose upon Interior, as the trustee-delegate of the United States, the traditional fiduciary duties of a trustee as defined in the law of trusts, Interior must demonstrate that "Congress has unequivocally expressed an intent to the contrary."

But Interior has not directed this Court to any unequivocal expression by Congress that it did not intend to impose upon the United States, as the trustee of the IIM trust, the traditional fiduciary duties defined at common law. Indeed, on October 3, 1994, just as Congress was preparing to vote on the 1994 Act, Congressman Mike Synar (D-Okla.), one of the principal proponents of the Act, informed the full House:

> It is time for Congress to take matters into its own hands, and to require by statute that the Secretary and the Department do what needs to be done to fix these problems and meet the Government's trust responsibilities to the account holders. . . .
>
> There is an understanding that, after [seven subcommittee hearings], we have been

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[12] Obviously, this holding by the D.C. Circuit supercedes the statement made by this Court in its 1999 opinion expressing doubt that "plaintiffs may simply claim that they are the beneficiaries of a trust relationship with the United States and therefore invoke all of the rights that a common law trust entails." Cobell V, 91 F. Supp. 2d at 29. This Court had qualified its conclusions in this regard by noting that this issue had "not been squarely addressed before by any court." Id. at 28. Clearly, it has now been addressed and resolved by the D.C. Circuit.

> unable to get the responsiveness that we need out of the BIA to perform the basic fiduciary responsibilities which we would expect out of any trustee. If this was done in the Social Security system, my colleagues, we would have had a war.

140 CONG. REC. 24,244 (1994) (emphasis added). Congressman Synar thus expressly stated what Congress had tacitly assumed: that what was expected from Interior in its administration of the IIM trust was nothing less than the basic fiduciary responsibilities expected of any trustee. Additionally, during an oversight hearing on the bill that became the 1994 Act, Congressman Bill Richardson (D-N.M.), the primary sponsor of the bill, declared:

> Let us not forget that the United States as a trustee for the Indian nations has solemn fiduciary duties. These duties include the duty of loyalty and the duty to make the corpus productive.
>
> We should hold the Federal Government to the same standard as any other trustee. This includes the principle that a trustee should subordinate its own interests to those of the beneficiary. Hence, the status of these funds should be of paramount importance to the Department of Interior, and the needs of the Indian nations with regard to these funds should supersede other obligations the Department may have.

Hearing Before the Subcomm. on Native American Affairs of the Comm. on Natural Resources on H.R. 1846 and 4833, 103d Cong. 2 (Aug. 11, 1994) (emphasis added).

The Court agrees that, in some respects, the IIM trust differs from a private trust. From that premise, however, it does not follow that "[b]ecause of these many differences, one cannot simply graft private standards onto the individual Indian trust." Defs.' Proposed Findings of Fact and Conclusions of Law at 223 (footnote omitted) ("Defs.' Prop. Findings and Conclusions"). The suggestion that the Court is attempting to "graft" standards onto the IIM trust implies that traditional common-law trustee duties represent a foreign concept that the Court is attempting to apply in an area where they do not belong. But "[i]t is well established that conduct of the Government as a trustee is measured by the same standards applicable to private trustees." Manchester Band of Pomo Indians v. United States,

363 F. Supp. 1238, 1245 (N.D. Cal. 1973) (citation omitted). Moreover, it is not plaintiffs' burden to demonstrate that the traditional common-law trustee duties apply to Interior; rather, as explained above, it is Interior's burden to show that Congress has unequivocally expressed an intent to the contrary. Additionally, the fact that the IIM trust possesses some qualities that distinguish it from a typical private trust does not mean that trust law does not govern its operations. To argue this is akin to arguing that because a particular contract differs in some aspects from a "typical" contract, it is not governed by contract law. Interior has directed the Court to no case law suggesting that a trust that is massively underdiversified, has had exceptional longevity, is not regulated by an outside regulatory agency or shareholders — or that possesses any of the distinctive qualities identified by Professor Langbein — thereby loses its status as a "trust" and is no longer governed by trust law. But this is precisely what Interior is implying when it alleges that because the IIM trust is different in some aspects from a typical commercial trust, it is not governed by traditional common-law standards.

Moreover, Interior's conclusions are seriously undermined by the testimony of Richard Fitzgerald, Acting Director of the newly-formed Office of Trust Regulations, Policies and Procedures at Interior:

> THE COURT: From your experience, is there a reason why this trust should be treated differently than any other trust in any bank?
>
> THE WITNESS: No, Your Honor. I have always believed that when the Congress said it was a trust, it knew what it was talking about. You know, words — and I did a thing when we were doing records one time about words have got meaning and, you know, we know what a trust is. So I have always considered that this was a traditional trust for identifiable beneficiaries. I have said that any number of times. The government holds identifiable assets in trust for identifiable American citizens and communities of American citizens. Now, the Congress does modify the

> trust in certain areas — the Navajo case is a case right on point, but the Apache case is also a case right smack on point.
>
> So yes, I do believe it is a trust, and I do believe that the principles that have been developed over 800 years are appropriate sources for the trustee to consult as the trustee discharges those responsibilities.

Tr., Day 8, AM session (May 12, 2003) at 20:18 - 21:12.

Finally, the Court must disagree with Professor Langbein's assertion that "if Congress passes a budget appropriation that gives you inadequate funds to carry out something that Congress has earlier said you should carry out, that is the same thing as if Congress says, we hereby amend the trust to order you not to carry out the earlier duty." First, Professor Langbein acknowledged that he was not aware of any case law supporting such a proposition:

> Q. Are you aware of any case law that deals with that issue [i.e., the relevance of an appropriations provision upon a trustee's fiduciary obligations to beneficiaries]?
>
> A. I'm not aware of case law bearing on these matters.
>
> Q. Okay.
>
> A. I think in general, the courts have stayed very far away from appropriations, interpretation questions.
>
> * * * * * * * * * * *
>
> THE COURT: Well, I take it, then, you're not aware of any court that has ever held that an appropriation like this could modify an underlying statute?
>
> THE WITNESS: No, but again, I have never seen a trust whose terms are embodied in statute and whose financing must be extrinsic to the trust. That's the astonishingly unique feature of this trust. That's why we're groping to apply unusual categories over in the world of trust.

Tr., Day 20, AM session (June 3, 2002) at 79:18 - 23, 80:1-9. Professor Langbein's remarks,

however, miss the point. In the absence of controlling precedent that insufficient appropriations legislation can modify the underlying substantive obligations owed by a trustee, the Court must conclude that such legislation does not modify such obligations. In other words, the burden is on Interior to prove that an insufficient appropriations act will excuse or modify the discharge of a trustee's obligations, not on plaintiffs to disprove it. This is in keeping with the D.C. Circuit's holding that "[c]ourts must infer that Congress intended to impose on trustees traditional fiduciary duties unless Congress has unequivocally expressed an intent to the contrary."

Moreover, this Court has previously rejected Interior's arguments that a lack of funding would excuse its failure to comply with its fiduciary duties. In Cobell V, this Court stated:

> Interior constantly emphasizes that its success is dependent upon proper budgeting. This argument, as discussed below, seems disingenuous given the lack of requests for proper funding until the institution of this lawsuit. More importantly, however, claims of lack of funding cannot be allowed to legally impair the United States' trustee-delegates' exacting fiduciary duties toward management of this trust. As Chief Judge Arnold of the Court of Appeals for the Eighth Circuit has stated:
>
> > [T]he government may not avoid its trust duties on the grounds that the budget and staff of the Department of Interior are inadequate. This circumstance may well excuse any delay on the part of individual employees of the [BIA]. But the United States may not evade the law simply by failing to appropriate enough money to comply with it.
>
> See Loudner v. United States, 108 F.3d 896, 903 n. 7 (8th Cir. 1997); see also [Forest Guardians v. Babbitt, 174 F.3d 1178, 1188 & n. 14 (10th Cir. 1999)] (holding that it would not accept defendant Babbitt's argument regarding unreasonable delay due to budgetary constraints in terms of breach of statutory duty but that, instead, "the agency defense of unavailable resources must be reserved as a defense against contempt if an injunction issues"). For these reasons, the court gives little weight to Interior's budgetary-constraints justification.

Cobell V, 91 F. Supp.2d at 48. This conclusion is consistent with the foremost treatise on the law of trusts, which provides that "[t]he trustee, having accepted [its appointment as trustee], is not relieved of liability merely because by the terms of the trust he is to receive no compensation. His duty to

administer the trust is not a contractual duty, and it is immaterial that he receives no consideration for his undertaking to administer the trust." 2A AUSTIN W. SCOTT & WILLIAM F. FRATCHER, THE LAW OF TRUSTS § 169, at 311 (4th ed. 1987) ("Scott on Trusts"); cf. Caswell v. Califano, 435 F. Supp. 127, 135 (D. Me. 1977) ("Moreover, defendant's claim of inadequate resources does not justify violation of a federal statute.") (citing cases). Therefore, although the defense of unreasonable resources might be available as a defense in a contempt proceeding, it does not relieve a trustee of liability for its failure to administer the trust.

The Supreme Court has also rejected the assertion that appropriations measures may be read as implicitly repealing previous law:

> The doctrine disfavoring repeals by implication applies with full vigor when the subsequent legislation is an appropriations measure. This is perhaps an understatement since it would be more accurate to say that the policy applies with even greater force when the claimed repeal rests solely on an Appropriations Act. We recognize that both substantive enactments and appropriations measures are "Acts of Congress," but the latter have the limited and specific purpose of providing funds for authorized programs. When voting on appropriations measures, legislators are entitled to operate under the assumption that the funds will be devoted to purposes which are lawful and not for any purpose forbidden. Without such an assurance, every appropriations measure would be pregnant with prospects of altering substantive legislation, repealing by implication any prior statute which might prohibit the expenditure. Not only would this lead to the absurd result of requiring Members to review exhaustively the background of every authorization before voting on an appropriation, but it would flout the very rules the Congress carefully adopted to avoid this need. House Rule XXI(2), for instance, specifically provides:
>
> > "No appropriation shall be reported in any general appropriation bill, or be in order as an amendment thereto, for any expenditure not previously authorized by law, unless in continuation of appropriations for such public works as are already in progress. Nor shall any provision in any such bill or amendment thereto changing existing law be in order."
>
> (Emphasis added.)
>
> See also Standing Rules of the Senate, Rule 16.4. Thus, to sustain petitioner's position, we would be obliged to assume that Congress meant to repeal pro tanto § 7 of the Act by means of a procedure expressly prohibited under the rules of Congress.

Tennessee Valley Authority v. Hill, 437 U.S. 153, 190-91 (1978) (emphasis in original) (internal citations and punctuation omitted); see also New York Airways v. United States, 369 F.2d 743, 748 (Ct. Cl. 1966) ("It has long been established that the mere failure of Congress to appropriate funds, without further words modifying or repealing, expressly or by clear implication, the substantive law, does not in and of itself defeat a Government obligation created by statute.") (citations omitted).

Nor has Interior's Office of the Solicitor endorsed the notion that appropriations legislation modifies Interior's substantive fiduciary obligations to the IIM beneficiaries. Regarding this issue, former Solicitor Krulitz prefaced his discussion by noting that

> [e]ven if the imposition of the trust responsibility doctrine is assumed to be completely consistent with present policy and administrative practice, the doctrine clearly places constraints on the future policy formulation and administrative discretion. Executive branch officials have some discretion in the discharge of the trust, but it is limited. For example, they may make a good faith determination that the compromise of an Indian claim is in the long term best interests of the Indian, but they are not free to abandon Indian interests or to subordinate those interests to competing policy considerations. Flexibility in setting policy objectives rests with Congress which alone is free to direct a taking or subordination of the otherwise paramount Indian interests.

Krulitz Letter at 14 (emphasis added). He then explained:

> Instances will surely arise where the discharge of trust responsibilities to the Indians raises unmanageable, practical or political difficulties for executive branch officials. It may be that congressional appropriations are inadequate to carry out a perceived duty — say, the quantification of Indian water entitlements — or that the enforcement of trust responsibilities results in an extraordinarily intense political backlash against the administration. Under such circumstances, it would seem that the responsibility of executive branch officials would be to seek express direction from the Congress. The existence of this congressional safety valve assures that the legal trust responsibility to American Indians is a viable doctrine not only now but in the future as well.

Id. (emphasis added). In short, when faced with this very issue, the highest legal official at Interior never advanced any notion that, in and of themselves, the passage of insufficient appropriations

measures might modify or repeal Interior's trustee obligations. Instead, Solicitor Krulitz made it clear that faced with such a circumstance, it would be "the responsibility of executive branch officials . . . to seek express direction from the Congress" as to how they should proceed.

And Congress, to its credit, has consistently provided funding to Interior to carry out its substantive trust responsibilities. Congress's intent that sufficient future funding should be made available to enable Interior to comply with its trustee duties is plain in its inclusion of section 303 of the 1994 Act. That section requires the Special Trustee to

> develop for each fiscal year, with the advice of program managers of each office within the Bureau of Indian Affairs, Bureau of Land Management and Minerals Management Service that participates in trust management, including the management of trust funds or natural resources, or which is charged with any responsibility under the comprehensive strategic plan prepared under subsection (a) of this section, a consolidated Trust Management program budget proposal that would enable the Secretary to efficiently and effectively discharge his trust responsibilities and to implement the comprehensive strategic plan, and [to] submit such budget proposal to the Secretary, the Director of the Office of Management and Budget, and to the Congress.

25 U.S.C. § 4043(c)(5)(A). Additionally, subsection (c)(5)(B) requires "[e]ach program manager participating in trust management or charged with responsibilities under the comprehensive strategic plans [to] transmit his office's budget request to the Special Trustee at the same time as such request is submitted to his superiors (and before submission to the Office of Management and Budget) in the preparation of the budget of the President submitted to the Congress." The Special Trustee is then required to "review each budget request submitted under subparagraph (B); certify in writing as to the adequacy of such request to discharge, effectively and efficiently, the Secretary's trust responsibilities and to implement the comprehensive strategic plan; and notify the program manager of the Special Trustee's certification." 25 U.S.C. § 4043(c)(5)(C).

Congress's inclusion of section 303 in the 1994 Act demonstrates its intent to ensure that Interior received appropriate funding to discharge its fiduciary obligations to the IIM beneficiaries. In the House Report accompanying the 1994 Act, the House Committee on Natural Resources explained that

> Section 303(c) requires the Special Trustee to assure that all policies and practices regarding trust fund management be coordinated among the BIA, BLM, and MMS and that the Department prepare comprehensive written policies to address all aspects of trust management including collections, accounting and timely reporting of transactions to account holders. Included within the Special Trustee's duties is the development of a consolidated Trust Management program budget proposal through consultation with program managers from BIA, BLM, MMS, and any other agency charged with any responsibility for the Special Trustee's comprehensive strategic plan. To achieve this program budget proposal, each program manager shall transmit the manager's office's budget proposal to the Special Trustee at the same time as such request is made to the manager's superiors.

H.R. REP. NO. 103-778, at 19 (1994), reprinted in 1994 U.S.C.C.A.N. 3467, 3478. As demonstrated by the testimony of Special Trustee Swimmer during the Phase 1.5 trial, the mechanism set in place by Congress appears to be generating sufficient funding requests:

THE COURT:	Well, I think that the money does make a difference, and the commitment to the money does make a difference, so I was disappointed to hear [this] morning about going the other direction on money, because I thought that that was a good sign, that the administration was willing to spend more money. That usually is a sign that things are going to happen.
THE WITNESS:	Well, I don't know what is in the appropriations, but I will tell you that the requests that have gone out from this particular administration, this Secretary, have been far, far above. In fact just as a level of magnitude, I am aware that when the first trustee came in I think we were dealing with 15 to 20 million dollars. Today, the special trustee's budget is in excess of 200 million. So you also have the Congress looking over our shoulder. They want to see performance as well, and they want to see this trust reformed.

Tr., Day 36, PM session (June 25, 2003) at 40:17 - 41:9 (emphasis added).

Additionally, apart from the testimony of Professor Langbein, Interior cites only two cases in support of its assertion that the traditional common-law fiduciary duties do not govern IIM trust administration. First, Interior cites a recent Supreme Court case in support of its assertion that this Court "must look to the statute or regulation establishing the trust relationship to determine the nature of the specific obligations owed, rather than simply applying all of the common-law trust duties." Defs.' Proposed Findings and Conclusions at 226. But United States v. White Mountain Apache Tribe, 123 S.Ct. 1126 (2003), actually supports rather than undermines the conclusion that the traditional common-law duties of a trustee govern the administration of the IIM trust. The issue to be determined in White Mountain Apache was whether the Court of Federal Claims "[possessed] jurisdiction over the White Mountain Apache Tribe's suit against the United States for breach of fiduciary duty to manage land and improvements held in trust for the Tribe but occupied by the Government." White Mountain Apache, 123 S.Ct. at 1130. In concluding that it did, the Court explained that a statute passed in 1960 providing that the former Fort Apache Military Reservation would be held by the United States in trust for the White Mountain Apache Tribe

> goes beyond a bare trust and permits a fair inference that the Government is subject to duties as a trustee and liable in damages for breach. The statutory language, of course, expressly defines a fiduciary relationship in the provision that Fort Apache be "held by the United States in trust for the White Mountain Apache Tribe." . . . . As to the property subject to the Government's actual use, then, the United States has not merely exercised daily supervision but has enjoyed daily occupation, and so has obtained control at least as plenary as its authority over the timber in [United States v. Mitchell, 463 U.S. 206 (1983) ("Mitchell II.")]. While it is true that the 1960 Act does not, like the statutes cited in that case, expressly subject the Government to duties of management and conservation, the fact that the property occupied by the United States is expressly subject to a trust supports a fair inference that an obligation to preserve the property improvements was incumbent on the United States as trustee. This is so because

> elementary trust law, after all, confirms the commonsense assumption that a fiduciary actually administering trust property may not allow it to fall into ruin on his watch. "One of the fundamental common-law duties of a trustee is to preserve and maintain trust assets," Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc., 472 U.S. 559, 572, 105 S.Ct. 2833, 86 L.Ed.2d 447 (1985) (citing G. Bogert & G. Bogert, Law of Trusts and Trustees § 582, p. 346 (rev.2d ed.1980)); see United States v. Mason, 412 U.S. 391, 398, 93 S.Ct. 2202, 37 L.Ed.2d 22 (1973) (standard of responsibility is "such care and skill as a man of ordinary prudence would exercise in dealing with his own property") (quoting 2 A. Scott, Trusts 1408 (3d ed.1967) (internal quotation marks omitted)); Restatement (Second) of Trusts § 176 (1957) ("The trustee is under a duty to the beneficiary to use reasonable care and skill to preserve the trust property"). Given this duty on the part of the trustee to preserve corpus, "it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties." Mitchell II, supra, at 226, 103 S.Ct. 2961.

Id. at 1133-34 (emphasis added) (footnotes and internal citation omitted).

In other words, the fact that the statute establishing the trust did not "expressly subject the Government to duties of management and conservation" did not lead the Court to conclude that such a duty did not exist. Instead, the Court deduced from "the fact that the property occupied by the United States is expressly subject to a trust" the conclusion that the common-law fiduciary duty of prudence and duty to preserve and maintain trust assets applied to the United States as a trustee. In short, the Court did not stop at the language of the statute in determining the scope of the United States's obligations as trustee, but instead looked to "elementary trust law" to provide the governing trust duties. Indeed, the Federal Circuit opinion affirmed by the Court explicitly stated that "[a]lthough neither the 1960 Act nor any pertinent regulation sets forth clear guidelines as to how the government must manage the trust property, we think it is reasonable to infer that the government's use of any part of the property requires the government to act in accordance with the duties of a common law trustee." White Mountain Apache Tribe v. United States, 249 F.3d 1364, 1377 (Fed. Cir. 2001).

Second, Interior cites Cherokee Nation of Oklahoma v. United States, 21 Cl. Ct. 565 (1990),

for the proposition that "the relationship between the United States and Indians is not comparable to a private trust relationship." Defs.' Prop. Findings and Conclusions at 226. That is not, however, what the U.S. Court of Claims said in Cherokee Nation. Instead, it merely observed that "[t]he general relationship between the United States and the Indian tribes is not comparable to a private trust relationship." Id. at 573 (emphasis added). But the IIM trust is not merely a "general relationship" with the United States, nor is it a relationship with Indian Tribes, as opposed to individual Indians. Accordingly, the precedential value of Cherokee Nation for the present case is, at best, extremely limited.

In sum, the D.C. Circuit has instructed this Court that it "must infer that Congress intended to impose on trustees traditional fiduciary duties unless Congress has unequivocally expressed an intent to the contrary." Interior is the trustee-delegate for the United States with respect to the IIM trust. Interior has directed this Court to no statute demonstrating that Congress has unequivocally expressed an intent not to impose upon Interior traditional fiduciary duties. Accordingly, this Court holds that Congress intended to impose upon Interior the traditional fiduciary duties of a trustee, and that the scope and nature of those duties are coextensive with the duties imposed upon trustees at common law.

2. The Fiduciary Duties Owed to the IIM Beneficiaries

Having reached the conclusion that the duties imposed at common law upon trustees govern the administration of the IIM trust, it will be necessary for the Court to enumerate these duties, together with their basic Restatement definition. The common-law duties that govern Interior's administration of

the IIM trust are as follows:[13]

a. Duty to Administer the Trust.

"Upon acceptance of the trust by the trustee, he is under a duty to the beneficiary to administer the trust." Restatement, Second § 169. As noted above, it follows from this duty that "[t]he trustee, having accepted, is not relieved of liability merely because by the terms of the trust he is to receive no compensation. His duty to administer the trust is not a contractual duty, and it is immaterial that he receives no consideration for his undertaking to administer the trust." 2A Scott on Trusts § 169, at 311.

b. Duty of Loyalty

"The trustee is under a duty to the beneficiary to administer the trust solely in the interest of the beneficiary. The trustee in dealing with the beneficiary on the trustee's own account is under a duty to the beneficiary to deal fairly with him and to communicate to him all material facts in connection with the transaction which the trustee knows or should know." Restatement, Second § 170. As stated by former Interior Solicitor Anderson, this duty requires the government "to administer trust resources solely in the interest of the beneficiary, so that any profits gained through administration of the trust accrue to the beneficiary." Anderson Memorandum at 14 (citing Manchester Band of Pomo Indians, 363 F. Supp. at 1245; Navajo Tribe of Indians v. United States, 364 F.2d 320, 324 (Ct. Cl. 1966);

[13] The volumes of the Restatement, Third dealing with the duties of a trustee have not yet been published. When these volumes are published, their provisions dealing with the duties of a trustee will supersede the analogous provisions in the Restatement, Second.

and Menominee Tribe of Indians v. United States, 59 F. Supp. 137, 141 (Ct. Cl. 1944)).

c. Duty Not to Delegate

"The trustee is under a duty to the beneficiary not to delegate to others the doing of acts which the trustee can reasonably be required personally to perform." Restatement, Second § 171. Congress, the settlor of the IIM trust, partly overrode this duty in the General Allotment Act, 24 Stat. 388, and the Indian Reorganization Act, 48 Stat. 984, by expressly delegating the United States's administration of the IIM trust to the Interior and Treasury Departments. Additionally, with the passage of the Indian Self-Determination and Education Act of 1975, Pub. L. No. 93-638 ("Self-Determination Act"), Congress further overrode this duty by authorizing federal agencies, including Interior, to transfer local control over the administration of federal programs such as the IIM trust to Indian Tribes.

d. Duty to Keep and Render Accounts

"The trustee is under a duty to the beneficiary to keep and render clear and accurate accounts with respect to the administration of the trust." Restatement, Second § 172. The nature and scope of this duty is discussed at length in the companion memorandum opinion issued this date. It will suffice here to note that, as affirmed in that opinion, the scope of Interior's duty to account is far broader than the specific provisions contained in the 1994 Act, which merely "sought to remedy the government's long-standing failure to discharge its trust obligations; it did not define and limit the extent of [Interior's] obligations." Cobell VI, 240 F.3d at 1100; see also id. at 1098 ("[T]he government is incorrect to the extent that it assumes that the 1994 Act forms the basis for its fiduciary obligations. The 1994 Act did

not create these obligations any more than it created the IIM trust accounts. As noted above, the 1994 Act was a remedial statute designed to ensure more diligent fulfillment of the government's obligations. It recognized and reaffirmed what should be beyond dispute — that the government has longstanding and substantial trust obligations to Indians, particularly to IIM trust beneficiaries, not the least of which is a duty to account."). Interior's duty to keep and render accounts includes the duty to retain records that are necessary to the performance of an accounting

e. Duty to Furnish Information

"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 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." Restatement, Second § 173. As noted by the Southern District of New York, "[t]he common law recognizes an obligation on the part of the trustee to provide full and accurate information to the beneficiary on his management of the trust." Martin v. Valley Nat'l Bank of Arizona, 140 F.R.D. 291, 322 (S.D.N.Y. 1991).

f. Duty to Exercise Reasonable Care and Skill

"The trustee is under a duty to the beneficiary in administering the trust to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property; and if the trustee has or procures his appointment as trustee by representing that he has greater skill than that of a man of ordinary prudence, he is under a duty to exercise such skill." Restatement, Second § 174.

With respect to this duty, Interior claims that "the applicable standard is that of a reasonable person similarly situated. Thus, the prudence standard applicable to Interior would be that of similarly situated federal agencies facing similar congressional restraints and co-existing statutory obligations." Defs.' Prop. Findings and Conclusions at 118 n.25. But the only authority cited by Interior in support of this assertion is the trial testimony and expert report of Professor Langbein. In turn, Professor Langbein does not direct this Court to any case law that would support the proposition advanced by Interior. Instead, Professor Langbein points to the official comment to the Uniform Prudent Investor Act, which explains that its standard is "the standard of the prudent investor similarly situated," and a subsection of the Employee Retirement Income Security Act ("ERISA"), which directs a plan fiduciary to behave as "a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims." 29 U.S.C. § 1104(a)(1)(B). However, both the "prudent investor" and "prudent man" standards are workable standards precisely because, under a given set of circumstances, there will be other similarly-situated prudent investors or prudent persons against whose conduct a court may measure a defendant's conduct. By contrast, the standard of a "similarly situated federal agenc[y] facing similar congressional restraints and co-existing statutory obligations" is virtually meaningless. It lacks any precise meaning because, to the Court's knowledge, there <u>are</u> no similarly-situated federal agencies charged with fiduciary responsibilities that face similar congressional restraints and co-existing statutory obligations. Therefore, the "similarly-situated federal agency" standard would simply mean whatever Interior wants it to mean.

However, the available case law does not suggest that the duty to exercise reasonable care and skill is meaningless, even when it is the United States that is charged with such a duty. Thus, the

Supreme Court has stated: "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. . . . As Professor Scott has written, 'A trustee is under a duty in administering the trust to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property.' 2 A. Scott, Trusts 1408 (3d ed. 1967)." United States v. Mason, 412 U.S. 391, 398 (1973) (internal citation omitted). In Manchester Band, the district court, having observed that "conduct of the Government as a trustee is measured by the same standards applicable to private trustees," did not utilize a "similarly-situated government agency" standard, but instead stated only that "[w]hile the normal standard of care and skill required of a trustee is that of a man of ordinary prudence in dealing with his own property, if the particular trustee has a greater degree of skill than that of a man of ordinary prudence, he will be held liable for any loss resulting from the failure to use such skill as he has." Manchester Band, 363 F. Supp. at 1244 (citing Restatement, Second § 174 cmt. a); see also Menominee Tribe of Indians v. United States, 101 Ct. Cl. 10 (1944) (concluding that "to whatever extent the Secretary of the Interior could have, in the course of prudent management of the affairs of the Indians, and without impairing funds which he reasonably thought it was necessary to keep supplied for the purpose of meeting authorized expenditures, used the non- interest-bearing funds or those bearing the lower rate of interest, and instead used funds bearing interest, or a higher rate of interest, the Government is under a duty to pay to the plaintiffs the interest thereby lost by them.").

Accordingly, the Court rejects Interior's assertion that its duty to exercise reasonable care and skill with respect to the administration of the IIM trust merely requires it to behave as a "similarly situated federal agenc[y] facing similar congressional restraints and co-existing statutory obligations"

would. Instead, the scope and nature of its duty is coextensive with the traditional common-law duty of a trustee to exercise reasonable care and skill in its administration of the trust.

g. Duty to Take and Keep Control

"The trustee is under a duty to the beneficiary to take reasonable steps to take and keep control of the trust property." Restatement, Second § 175. In the Indian Self-Determination Act, Congress allowed for federal agencies, including Interior, to transfer local control over the administration of federal programs to Indian Tribes, including the administration of trust assets in the IIM trust. However, although Interior may transfer local control over the administration of assets in the IIM trust to Indian Tribes, Interior is not thereby wholly relieved of its duty to take and keep control of such assets. Rather, such a transfer is akin to a transfer of possession of portions of the trust property to an attorney, banker, or other agent. See id. § 175 cmt. e ("To the extent to which it is reasonable for the trustee to entrust the possession of the subject matter of the trust to his attorney, broker, banker or other agent, the trustee can properly do so.").

h. Duty to Preserve the Trust Property

"The trustee is under a duty to the beneficiary to use reasonable care and skill to preserve the trust property." Id. § 176. This includes a duty on the part of Interior "to use reasonable care to protect the trust property from loss or damage." Id. § 176 cmt. b.

i. Duty to Enforce Claims and to Defend Actions

"The trustee is under a duty to the beneficiary to take reasonable steps to realize on claims which he holds in trust." Id. § 177. "The trustee is under a duty to the beneficiary to defend actions which may result in a loss to the trust estate, unless under all the circumstances it is reasonable not to make such defense." Id. § 178.

j. Duty To Keep Trust Property Separate

"The trustee is under a duty to the beneficiary to keep the trust property separate from his individual property, and, so far as it is reasonable that he should do so, to keep it separate from other property not subject to the trust, and to see that the property is designated as property of the trust." Id. § 179.

k. Duty with Respect to Bank Deposits

"While a trustee can properly make general deposits of trust money in a bank, it is his duty to the beneficiary in making such a deposit to use reasonable care in selecting the bank, and properly to earmark the deposit as a deposit by him as trustee." Id. § 180. Congress has largely overridden the duty to use reasonable care in selecting a bank in which to make deposits by mandating that deposits of IIM trust funds are to be made to Treasury. However, the Court is not aware of any congressional provision overriding Interior's duty to earmark.

l. Duty to Make the Trust Property Productive

"The trustee is under a duty to the beneficiary to use reasonable care and skill to

make the trust property productive." Id. § 181. Additionally, "[a] trustee of land is normally under a duty to lease it or to manage it so that it will produce income." Id. § 181 cmt. a.

m. Duty to Pay Income to Beneficiaries

"Where a trust is created to pay the income to a beneficiary for a designated period, the trustee is under a duty to the beneficiary to pay to him at reasonable intervals the net income of the trust property." Id. § 182.

n. Duty to Deal Impartially With Beneficiaries

"When there are two or more beneficiaries of a trust, the trustee is under a duty to deal impartially with them." Id. § 183.

o. Duty with Respect to Co-Trustees

"If there are several trustees, each trustee is under a duty to the beneficiary to participate in the administration of the trust and to use reasonable care to prevent a co-trustee from committing a breach of trust or to compel a co-trustee to redress a breach of trust." Id. § 184. It is therefore the duty of each of the two trustee-delegates (Interior and Treasury) to use reasonable care to prevent the other from committing a breach of the other's trust duties or to compel the other to redress a breach of trust.

p. Duty with Respect to Person Holding Power of Control

"If under the terms of the trust a person has power to control the action of the trustee in certain

respects, the trustee is under a duty to act in accordance with the exercise of such power, unless the attempted exercise of the power violates the terms of the trust or is a violation of a fiduciary duty to which such person is subject in the exercise of the power." Id. § 185.

3. Recommendations

The Court having held that the administration of the IIM trust is governed, inter alia, by the traditional duties imposed at common law upon trustees, it must now look to plaintiffs' and NCAI's recommendations for ensuring Interior's compliance with these duties.

As noted above, plaintiffs recommend that the Court "appoint [a] new and independent trust administration management solely to administer the Individual Indian Trust." Plaintiffs' Compliance Plan at 33. However, if this Court were to direct Interior to hire new executive officials to assist it in the administration of its trust duties, it would be treading on dangerous constitutional waters indeed. Therefore, although plaintiffs' recommendation is well-intentioned, the Court nevertheless must decline.[14]

NCAI informs the Court that the Indian Tribes seek "a meaningful role in a trust management oversight body that would be independent of the DOI, and would monitor and audit the Government's implementation of [policies] and procedures to ensure the proper discharge of the Secretary's trust responsibilities." First Amicus Brief at 13. As stated in the companion memorandum opinion issued this date, the Court has decided to appoint a monitor to report upon Interior's efforts to implement the

[14] Of course, the Court's appointment of a monitor in this case does not raise such separation-of-powers concerns because the monitor is a judicial official, not an official of the executive branch.

structural injunction that this Court has issued. The Court certainly considers it appropriate for the monitor to keep well-informed as to the interests of the Tribes regarding the implementation of the structural injunction in this case. Therefore, the Court will direct the monitor to meet with a representative or representatives of NCAI on a quarterly basis, and to file with this Court a complete report of the discussions that take place at such meetings. The Court will thereby be informed as to any concerns of the Tribes regarding the implementation of the structural injunction. Additionally, in order to keep the Tribes well-informed as to the injunction's ongoing implementation, the Court will direct the monitor to serve upon NCAI a copy of every report that the monitor files, at the same time that it is filed with the Court and served upon the parties.

NCAI further "encourage[s] this Court to continue its efforts to ensure that the DOI implements policies and procedures to properly discharge its trust responsibilities. Such policies and procedures should include judicially enforceable rights in the federal courts for equitable relief to enforce the failure to perform or the negligent performance of trust duties." Id. In clarifying that the duties imposed upon trustees at common law, in addition to the specific duties in the 1994 Act, govern the administration of the IIM trust, the Court has done all within its power to ensure that future breaches of those duties will be able to be redressed by the courts. However, there is an important element that could potentially impede the enforcement of such rights — namely, the existence of federal sovereign immunity. As the Supreme Court reaffirmed only a few months ago, "[j]urisdiction over any suit against the Government requires a clear statement from the United States waiving sovereign immunity, together with a claim falling within the terms of the waiver. The terms of consent to be sued may not be inferred, but must be unequivocally expressed, in order to define a court's jurisdiction." White Mountain

Apache, 123 S.Ct. at 1131-32 (citations and internal punctuation omitted). The decision to waive sovereign immunity rests solely with Congress, not with the courts. The Court is aware that Congress is presently considering legislation relating to the administration of the IIM trust.

Finally, having determined that the common-law fiduciary duties govern the administration of the IIM trust, the Court deems it appropriate to allow Interior, in the first instance, to determine how it will bring itself into compliance with these duties. Therefore, it will direct Interior to file a statement identifying the steps it intends to take as part of its To-Be Plan to bring itself into compliance with each of these common-law duties. Additionally, if the measures it plans to undertake as part of its To-Be Plan might be deemed to be inconsistent with any of these duties, Interior should provide a description of such measures, together with a full explanation of why the proposed action should not be considered to be inconsistent with its common-law duties.

C. Protection of Tribal Authority and Sovereignty

The second fundamental trust reform principle identified by NCAI is that "[a] primary trust responsibility of the United States is to protect the governing authority of Indian tribes, including the ability of tribes to regulate land use and resource management within their own reservations as well as the right to manage trust assets and accounts through self-determination contracts and compacts." First Amicus Brief at 13.

As the Supreme Court has observed,

> our cases recognize that the Indian tribes have not given up their full sovereignty. We have recently said that Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory. They are a good deal more than private, voluntary

> organizations. The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.

United States v. Wheeler, 435 U.S. 313, 323 (1978) (citations and internal punctuation omitted).

In an earlier case, the Court noted that the tribal sovereignty doctrine

> provides a backdrop against which the applicable treaties and federal statutes must be read. It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government. Indians today are American citizens. They have the right to vote, to use state courts, and they receive some state services. But it is nonetheless still true, as it was in the last century, that the relation of the Indian tribes living within the borders of the United States is an anomalous one and of a complex character. They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided.

McClanahan v. State Tax Comm'n of Arizona, 411 U.S. 164, 172-73 (1973) (internal citations and punctuation omitted); see also United States v. Mitchell, 463 U.S. 206, 225 (1983) ("Mitchell II") ("Our construction of . . . statutes and regulations [relating to a fiduciary relationship between the United States and Indian allottees] is reinforced by the undisputed existence of a general trust relationship between the United States and the Indian people."). The passage of the Self-Determination Act reinforced the importance of the principle of tribal sovereignty. Included in the act is a declaration of congressional policy that expressly "recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of educational as well as other Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities." 25 U.S.C. § 450a(a).

The declaration further stated:

> Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful
> participation by the Indian people in the planning, conduct, and administration of those programs and services. In accordance with this policy, the United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities.

25 U.S.C. § 450a(b). As NCAI notes, since the inception of the Tribal Self-Governance Program in 1990, no delegation of trust programs to the administration of a Tribe has ever been revoked on account of a Tribe's failure of administration. First Amicus Brief at 14 n.8.

NCAI has "urge[d] this Court, as it considers the appropriate remedies to ensure the Department's compliance with its trust responsibility, to fully recognize that the trustee's duties must be administered in compliance with tribal law and ordinances, and to recognize and protect the important interests that the [Tribes] have in trust management under the [Self-Determination Act]." Id. at 14-15. Plaintiffs have also noted that "[i]t is axiomatic that a trustee must abide by and administer the trust in compliance with governing law. In Indian Country, governing law includes tribal law." Pls.' Compliance Plan at 18 n. 24 (citations omitted).

In Cobell VI, the D.C. Circuit noted that "[i]t is well understood that the extent of a trustee's duties and powers is determined by the trust instrument and the rules of law which are applicable." Cobell VI, 240 F.3d at 159 (quoting Restatement, Second § 201, at 442) (punctuation omitted). The Court concludes that the rules of law applicable to the administration of the IIM trust include tribal law

and ordinances.

However, although Interior acknowledges that NCAI's second fundamental principle "accord[s] with general terms of existing policies of Interior concerning trust management," Interior's Plan does not expressly state that its administration of the IIM trust must be governed in compliance with applicable tribal law and ordinances. Interior Defs.' Resp. to NCAI's Second Amicus Br. at 2-3. Instead, its Plan states only that the sources it looks to for guidance in administering its trust duties include "applicable federal statutes, Interior regulations, the Departmental Manual, OMB circulars, Department of the Treasury guidelines, generally accepted accounting and auditing standards, its employees' and consultants' experience and expertise, as well as other sources of relevant fiduciary practices." Interior's Comprehensive Plan at 3-28. This list nowhere mentions applicable tribal law and ordinances. This is a serious omission, given that one of the major risks that Interior has identified as potentially interfering with the successful implementation of its Plan is if "[v]arious major stakeholders [were to] disagree on the [Comprehensive Plan's] mission and implied boundaries." Id. at 5-13. Moreover, Interior has assessed the potential impact of this risk as "high," explaining that "[i]f the major stakeholders cannot agree on what [the Comprehensive Plan] is and what it isn't, then service and performance expectations will always be misaligned and dissatisfaction always prevalent." Id.

It is manifest that the Indian Tribes are major stakeholders in the administration of the IIM trust. As noted above, tribal interests in trust land and natural resources are physically intermingled and recorded in the same title and ownership systems as the individual interests, and tribal and individual resources are often managed and leased in large units under the same leasing and contractual agreements. Additionally, in many instances, Indian Tribes are responsible for local administration of

various aspects of the IIM trust, pursuant to the authority granted to them under the Self-Determination Act. Therefore, the Court concludes that Interior's omission of an express statement that it will manage the administration of the IIM trust in compliance with applicable tribal law and ordinances is an omission that is so defective that it will necessarily delay rather than accelerate its ability to comply fully with its fiduciary obligations to the IIM beneficiaries. Accordingly, the Court will include in its structural injunction a clarification that Interior must administer the IIM trust in compliance with applicable tribal law and ordinances.

In order to facilitate its compliance with applicable tribal law and ordinances, the Court will direct Interior to submit a list of tribal law and ordinances that it deems applicable to its administration of the IIM trust, together with a full statement of the manner in which it considers these laws and ordinances to affect such administration. Following Interior's submission of this list, the Court will permit plaintiffs to submit a brief in response to Interior's submission, which may include a supplemental list of tribal law and ordinances that plaintiffs deem applicable to Interior's administration of the IIM trust. The Court will also grant NCAI leave to submit an amicus curiae brief in response to Interior's submission, which may include a supplemental list of tribal law and ordinances that NCAI deems applicable to Interior's administration of the IIM trust. After these briefs have been filed, either party may file a motion for clarification of the Court's provision in its structural injunction that Interior must administer the IIM trust in compliance with applicable tribal law and ordinances.

D. No Redirection of Funds for BIA Services

The third fundamental trust principle identified by NCAI is that "reform of the United States'

Indian trust fund management not reprogram funds from vitally needed BIA services and must not create new levels of bureaucracy that would impede the delivery of trust services to local needs." First Amicus Brief at 15. NCAI explains that "[m]any individual Indians lack access to basic resources and depend on BIA and tribal administered programs for their very survival. Many others rely on such services as education to provide the opportunities for self-sufficiency and advancement. Diverting resources from these programs to correct the DOI's historical or current failures in trust administration is not trust reform, but another breach of trust." Id. at 16.

NCAI further notes that in the 1994 Act,

> Congress provided a mechanism intended to remedy the Department's failure to request adequate appropriations for Indian trust programs. The Special Trustee is charged with the duty of certifying the adequacy of the BIA budget to meet its trust reform and other obligations. . . . This provision of the 1994 Act should be properly implemented as a mechanism to communicate to Congress whether the DOI has requested sufficient funding to carry out the obligations due Indians under its trust responsibility. The DOI's duty is to request adequate funding for trust programs. It is for Congress, not the DOI, to decide whether adequate funding will be provided.

Id. at 16-17 (footnote and citation omitted). The Court agrees that this provision should be properly implemented, and that any claims that the Office of the Special Trustee has not complied with this statutory requirement should be brought before this Court. However, NCAI further requests that this Court require such certifications to "include detailed identification of any additional funding for trust reform that must come from new appropriations, and a signed statement that funding and personnel for BIA program services have not been diminished by, or reallocated to, the DOI's trust reform activities." Id. at 41.

But the Court can find no provision in the 1994 Act that would permit it to order such

requirements. The Court is sympathetic to the concerns of the Tribes regarding the adequacy of funding for Indian education, social services, and law-enforcement programs administered by the BIA, and it agrees that Congress should adequately fund those programs. But to paraphrase NCAI's amicus brief, "it is for Congress, not the DOI, to decide whether adequate funding will be provided" for such programs. Of course, if any of the Tribes possess a justiciable claim that Congress has inadequately funded Indian education, social services, and law-enforcement programs in violation of applicable federal statutes, they may file such a claim in the proper court. But such a claim has not been raised in the present case, and thus, it is not a legal question that is presently within the purview of this Court.

The Court stresses that it is in no way either stating or implying that Interior should transfer or reprogram funds allocated by Congress to fund education, social services, and law-enforcement programs for Indians, and use them to fund its historical accounting of the IIM trust fund. Nor does the Court have any reason to believe that it will be necessary for Congress to do so. To this Court's knowledge, Congress has made no representation that it will be necessary to reallocate funds intended for these BIA-administered programs in order to adequately fund Interior's administration of the IIM trust, or that it intends to make such a reallocation.[15]

E. Increased Tribal Control over Land and Resources

The fourth fundamental trust principle identified by NCAI is that "trust reform must provide for increased tribal control over land and resources along with a federal system that provides oversight and

[15] The Court is, of course, aware that some staff members and Interior officials have, on occasion, expressed their views that Congress will never fund a transaction-by-transaction historical accounting. But Congress has said no such thing.

technical assistance in flexible arrangements driven by the unique circumstances of each reservation." Id. at 17. NCAI explains that

> the effective administration of the Indian trust will not be accomplished with a uniform, one size fits all solution. Prospective reform requires reservation-specific approaches. . . . Also, trust assets can be managed prudently and effectively where the trustee gives appropriate deference to tribal law in its administration of the trust and where the federal government responds to tribal needs, including technical assistance to improve the tribes' resource management capacity. This level of flexibility and sensitivity to local tribal concerns has important implications for the regional and local level structure of the DOI bureaucracy administering trust resources, services and accounts.

Id. As explained above, the Court agrees that Interior must give appropriate deference to tribal law in its administration of the IIM trust, and it has directed Interior to submit a list of tribal laws and ordinances that it deems applicable to its management of the trust. NCAI also suggests that "any trust reform restructuring assure that at the regional/local level, each tribe interacts with a single governmental decision-maker . . . who has authority over the entire range of Indian programs (uniting trust resources, services and accounts)." Id. at 17-18. Although the Court agrees with this suggestion, NCAI has not directed this Court to any provision in the 1994 Act or other applicable law (including common-law trust duties) that would mandate such interaction. Accordingly, the Court must conclude that, unfortunately, this issue is beyond the purview of the Court in the present case.

F. Involvement of Tribal Governments

The fifth fundamental trust principle identified by NCAI is that "tribal governments must be intimately involved in developing new systems and policies for trust management, with consultation taking place in a manner that ensures that tribal issues are actively addressed." Id. at 18. NCAI

explains that

> [w]hen the management of trust assets are at stake, Congress has spoken clearly to provide Indian tribes the opportunity to directly manage and administer those resources. Congress has also made clear that when policies and procedures governing the management of trust assets are involved, Indian tribes must be consulted and given the opportunity to participate in the development of those policies and procedures in a manner that considers their concerns.

Id. at 19 (citations omitted). NCAI identifies a number of congressional acts, including the Self-Determination Act, that make clear Congress's intent in these respects. It also points to an executive order issued by President Clinton entitled "Consultation and Coordination with Indian Tribal Governments" that expresses the executive branch's agreement with Congress upon such issues. See Exec. Order No. 13,175, 65 Fed. Reg. 67249 (Nov. 6, 2000).

In support of this fifth principle, NCAI recommends in its first and second amicus briefs that this Court "direct the DOI to halt its ongoing reorganization of the BIA and expansion of OST, pending the Court's rulings in this litigation." Br. for Amicus Curiae National Congress of American Indians, Aug. 4, 2003 ("Second Amicus Brief") at 22. NCAI points out that Interior's proposed reorganization efforts have been criticized by tribal leaders and that Interior failed to consult with the Indian Tribes prior to making its decision to reorganize.

Unfortunately, the Court must decline NCAI's recommendation, not because it deems it to be without merit, but because it is a matter beyond the purview of the Court in the present litigation. First, as tacitly acknowledged by NCAI in its June 18, 2003 resolution, this is a matter for congressional decision, not for the courts. See Second Amicus Br. at attach. B (resolving to "call[] upon Congress to immediately halt the reorganization of the Bureau of Indian Affairs until the concerns of Tribal Leaders are fully addressed by a workable and effective reorganization plan, and until the 'To Be' process,

developed through true and meaningful consultation with Indian Tribes, is completed" and requesting "a series of hearings before the Senate Committee on Indian Affairs and the House Resources Committee on the BIA reorganization"). Second, if NCAI possessed a judicially-cognizable claim that Interior's planned reorganization violated established law — an issue as to which the Court makes no finding one way or the other — it would need to file a complaint seeking injunctive relief against Interior in order to halt the reorganization process. Because NCAI is not a party to the present litigation, the Court is precluded by the standing doctrine from entertaining such a request in the present case.

The Court recognizes that NCAI will doubtlessly be disappointed by this Court's decision to decline its recommendation, and it regrets that it must do so. But as explained above, this Court has no other choice in the matter because the issue is beyond its purview in the present case.

G. Core Systems

Finally, NCAI asserts that "[a]t its heart, Indian trust fund administration requires accountability in three core systems that comprise the trust business cycle: 1) Title; 2) Leases/Sales; and 3) Accounting. These core systems must be accurate and integrated, timely, and be subject to credible standards and oversight." First Amicus Brief at 25 (footnote omitted). NCAI critiques Interior's Compliance Plan for failing to include any specific plans to fix the existing problems with these three core systems. The Court will analyze NCAI's critique and recommendations.

First, NCAI describes the title and ownership system of the IIM trust as "the most fundamental aspect of the trust system. DOI cannot accurately collect and distribute trust funds if it does not have correct information about the beneficial owners of the trust assets. This is the starting point for any

effort to fix the trust system." Id. at 25-26 (footnote omitted). It explains the problems with the current title and ownership system:

> Currently, the BIA is using ten different title systems in the various Land Title Record Offices around the country, both manual and electronic. These systems contain overlapping and inconsistent information. The systems are largely "stand alone" in that they do not automatically reconcile the ownership information in the agency offices, in tribal records, or in the lease distribution records that are used for daily operations. Because records management standards and quality control procedures are lacking, there is no assurance that title records are accurate. These inaccuracies result in [the] incorrect distribution of proceeds from trust resources, questions regarding the validity of trust resource transactions, and the necessity to repeatedly perform administrative problems such as probate. Consequently, a large backlog of corrections has developed in many of the title offices, and this has compounded the delays in probate, leasing, mortgages, and other trust transactions that rely on title and ownership information. In turn, each of these delays compounds the errors in the distribution of trust funds.

Id. at 26 (footnote omitted). Because "[c]leaning up the ownership information and implementing an effective title system that is integrated with the leasing and accounting systems is a primary need for the Indian trust system," NCAI encourages this Court "to ensure that expeditious reforms are made to the title system, including particularly the probate process." Id. at 26, 27.

Second, NCAI notes the importance of the leasing system of the IIM trust: "Most Indian trust transactions take the form of a lease of the surface or subsurface of an allotment, permits to allow the lessee to conduct certain activities in return for a fee, or a contract for the sale of natural resources such as timber." Id. at 27. It then identifies current problems with the leasing system:

> Although leasing records are vital to ensure accurate collection of rents or royalties there are no consistent procedures or fully integrated systems for capturing this information or for accurately identifying an inventory of trust assets. Currently, BIA has no standard accounts receivable system and many offices have no systems to monitor compliance, or to verify the quantity and value of natural resources extracted. The accounting system most often begins with the receipt of a check that is assumed to be accrurate and timely. Implementing an effective lease recording system that is integrated with the title and accounting systems is a primary need for the Indian trust system, but the BIA has only recently begun to investigate possible technologies

for this effort.

Id. Given the problems with BIA's leasing system, NCAI encourages this Court to "ensure that [Interior's] management information and administrative systems provide accurate and timely information regarding the trust resource transactions that produce income that is deposited into trust accounts." Id.

Third, NCAI critiques the IIM accounting system:

> The Government acknowledges that it operates multiple systems to track beneficiary information, title information, ownership and real property information, and accounting information. It further clarifies that these systems are not standardized and that important information in different sectors of those systems do not agree.
>
> The DOI Plan needs to set out how its systems will integrate information from one function into another (from title to leasing to accounting) and how the systems can be used to verify data. The DOI should also set out what oversight capabilities are planned into the system (verification and audit). Any proposal should include a plan for document retention and ease of access to facilitate audit and internal verification procedures. For example, databases should all include a field for identifying source documents. Furthermore, the DOI system needs a built-in cross-check between BIA entries to its control account and Treasury's entries to its control account. This system should automatically produce a daily exception list to be examined immediately.

Id. at 28.

Fourth, NCAI points out that Interior's Plan "further omits discussion of at least one essential element that must be implemented to effectively preserve the trust corpus — properly distinguishing trust principal and trust income." Id. at 29. It asserts that without a plan to distinguish principal from income during the accounting process, "the trust corpus will continue to erode to the detriment of tribes and individual Indians." Id. at 29-30.

NCAI thus recommends that Court "focus its oversight efforts on the core trust systems essential to trust fund accounting and trust asset management. . . title, leasing and accounting systems. These core systems must be functional, accurate, integrated, timely and subject to credible oversight."

Id. at 39. Specifically, NCAI recommends that this Court direct Interior to "complete detailed plans, policies and procedures for correcting those systems that can be implemented within six months of the date of the Court's order." Id. at 40.

The Court is concerned that Interior's Comprehensive Plan lacks any specific proposals to ensure that its title, leasing, and accounting systems are integrated and functional, and can be depended on in the future to generate accurate information. Without these systems operating correctly, it does not seem possible that Interior will be able to comply with the 1994 Act's requirement that

> [n]ot later than 20 business days after the close of a calendar quarter, the [Interior] Secretary shall provide a statement of performance to each Indian tribe and individual with respect to whom funds are deposited or invested pursuant to [25 U.S.C. § 162a]. The statement, for the period concerned, shall identify the source, type, and status of the funds; the beginning balance; the gains and losses; receipts and disbursements; and the ending balance.

25 U.S.C. § 4011(b). Nor does it appear that Interior will be able to comply with its pre-existing duty to account to the IIM beneficiaries without these systems operating correctly. It may be that Interior is planning efforts to address the problems with these systems, but the Court is unable to determine this from the vague language of Interior's Comprehensive Plan. Accordingly, the Court will include in its structural injunction a provision directing Interior to submit a detailed plan of measures it intends to take to correct the problems with the leasing, title, and accounting systems of the IIM trust fund that have been identified by NCAI in its amicus brief. This plan must include a detailed timetable for the implementation of specific measures that will correct these problems.

The Court also agrees that Interior's Comprehensive Plan contains no mention of any intent to distinguish income from principal during its historical accounting of the IIM trust fund. Although the Plan does include "[s]ections applicable to Indian Trust of the Uniformed [sic] Principal and Income

Act" among a list of "requirements that may contain provisions affecting the trust management business lines," this reference is so vague as to be virtually meaningless. As affirmed above, Interior must administer the IIM trust in accordance with the traditional common-law duty to use reasonable care and skill to preserve the trust property. The Court will therefore include in its structural injunction a provision directing Interior to identify the steps it intends to take as part of its To-Be Plan to distinguish principal from income during its historical accounting of the IIM trust fund, in accordance with its duty to use reasonable care and skill to preserve the trust property.

V. CONCLUSION

On September 17, 2002, the Court directed Interior to submit a plan for bringing itself into compliance with the fiduciary obligations it owes to the IIM trust beneficiaries. The Court must determine whether Interior's Comprehensive Plan, as modified by provisions in the structural injunction issued this date, represents a reasonable plan to bring Interior into compliance with its fiduciary obligations in a timely fashion.

During the Phase 1.5 trial, this Court qualified Richard Fitzgerald, Acting Director of Interior's Office of Trust Regulations, Policies and Procedures, as an expert on trust operations, trust asset management, trust standards, and trust systems. See Tr., Day 6, PM session (May 8, 2003) at 23:2-11; 34:5. Fitzgerald testified that, in his opinion, Interior's Comprehensive Plan was a reasonable plan for bringing Interior into compliance with its fiduciary duties, if it could be implemented:

> Q. Do you believe presently that the Department of the Interior has individuals with the necessary experience and skills to bring the IIM Trust into compliance with the trust standards?

A. There are some people who know what needs to be done from an operational standpoint. Donna [Erwin], I think, is an outstanding person who understands what a trust is and what trust operations are.

I think that plan that has been put together is a reasonable plan if it can be implemented. But from a management standpoint, you know, and I have a certain amount of experience with managing lawyers in particular, one of the most difficult things that the Department is going to face is the implementation of the plan that they have got.

Once it is successfully implemented, like with any plan, we will find out where the weak points are, and the Department will find out where the weak points are, and like in any management process, good management will address those weak points and bring about the necessary change.

I think there are — to answer your question, yes, I think that there are some people there who have got a good sense of what needs to be done. Donna [Erwin], Doug Lords, Margaret Williams — basically the OTFM people, because they have got, in my view, . . . good experience with managing at least the money that comes out of the trust [assets].

Id. at 41:1-25 (emphasis added). NCAI has also offered a qualified positive assessment of the As-Is / To-Be process contained in Interior's Comprehensive Plan:

> Amicus NCAI notes that the As-Is / To-Be business processing reengineering has the potential for squaring the DOI's trust reform implementation with the requirements set out by Congress and under review by this Court. Provided that tribes are actively involved in the reengineering and the Court retains oversight, the effort may offer system-wide solutions to the problems of trust mismanagement rather than simply responses to its symptoms. While not covering every trust activity, the As-Is study is the most comprehensive and current review documenting trust operations.
>
> With tribal participation, this comprehensive study could serve as a powerful tool for reform by offering a more complete picture of the Government's structures, systems and processes to carry out its trust responsibility to tribes and individual Indian. Absent tribal involvement and Court oversight, however, the DOI will likely use the reengineering as a tool to justify directing trust reform in the agency's, not the beneficiaries' interest. Whether the Trust Reform Task Force is reconvened, reinvigorated, or another tribal participation mechanism is established, tribes must be included in the evaluation of the As-Is recommendations and the To-Be modeling.

First Amicus Brief at 36 (emphasis in original).

As explained in the companion memorandum opinion issued this date, controlling precedents

such as Brown v. Board of Education, 349 U.S. 294 (1955) ("Brown II") and Lewis v. Casey, 518 U.S. 343 (1996), require this Court to allow an institutional defendant the first opportunity to propose a remedial plan designed to cure its violations of law. The Court concludes that Interior's Comprehensive Plan, as amended by the relevant provisions of the structural injunction issued this date, represents a reasonable next step in the process of bringing Interior into compliance with its fiduciary obligations to the IIM beneficiaries.

But a plan is merely ink on paper. Fitzgerald thus qualified his remarks by explaining that Interior's Comprehensive Plan represents a "reasonable plan if it can be implemented," and NCAI similarly stressed that the As-Is / To-Be process possesses the "potential for squaring the DOI's trust reform implementation with the requirements set out by Congress and under review by this Court." In short, Fitzgerald's testimony on a slightly different topic is relevant to the present issue:

> Q: [A]mong other things, the [Restatement of Trusts] has a list of some — of a number of duties — duty of loyalty, duty of care, duty of skill. Do you think that those duties govern this trust as well?
>
> A. I believe they do. And I think that the Department believes that, too, and I will tell you why. The Secretary put out his trust principles back in 2000, I guess. And the memo that accompanied those had a paragraph about sources of guidance.
>
> That paragraph references the Krulitz letter. It obviously references federal law, but it also references the Krulitz letter, and then a list of federal Indian trust cases.
>
> If you go back and you read those Indian trust cases, you will see in, I think every one, the courts refer to and rely on the — to the restatement, and Scott, and [Bogert]. So the Secretary has already said that those things are valid sources of guidance, at least to my mind.
>
> THE COURT: And you think that that is still outstanding as valid guidance?
>
> THE WITNESS: Your Honor, it is still in the manual. Now again, it is the implementation

> thing. You know, having it in the manual — we used to see this in bank regulations all of the time.
>
> A good set of policies and procedures was absolutely wonderful to have on the books, but you had to check to see whether or not they were being followed, and most of the time, or often, when you would find a bank that was in trouble, you would find that the policies and procedures, which were pretty good, were just not being followed.

Id. at 48:17 - 49:22 (emphasis added). It has frequently been observed that the Enron Corporation possessed an extensive, 65-page code of ethics. Obviously, the mere existence of this code did not prevent the corporation's officers and directors from behaving unethically. Interior's Comprehensive Plan will be similarly useless unless it is actually implemented. Again, the Court turns to Fitzgerald's testimony:

> Q. Well, let me touch upon that for a moment. You say if [Interior] can implement it. What are some of the things that give you a concern regarding whether they can implement this plan?
>
> A. Reading things like the legislative history for the Reform Act, you will see there that the Department has attempted over many years to reform the trust systems and have not been able to do it.
>
> Reading things like [Interior's Inspector General's] Report of a year ago. In the very, very beginning, the IG talks about the bunker mentality at the Department, something that he has observed for over 20 years, and where offices fight one another, and that sort of thing.
>
> There was even a report on the front page of The New York Times about a year ago about — that the Secretary had brought in somebody from the FBI to find out how many policemen the Department has and that fellow has been, from what The Times report says, has been not successful because he has been fought by all of the various offices.
>
> We hope that the Department can get beyond that, but that is always, again — and particularly in government, I've got to say, I don't think this has anything to do particularly with the BIA, but large departments are difficult to manage, and so there is going to be a challenge there, I believe, that the Department needs to solve if they are going to be able to implement what needs to be implemented, because I don't think everybody is — change is resisted, as we all know.

Tr., Day 8, AM session (May 12, 2003) at 17:14 - 18:16.

As the Court has explained in its companion memorandum opinion, it is very skeptical of the notion that Interior's extraordinary resistance to the clear mandates of Congress and the courts may be explained away simply as the slowness of government bureaucracy. The bunker mentality existing at Interior is not a typical characteristic of federal agencies. The Court will therefore not simply remand to Interior, as it did following the Phase I trial in 1999, but will instead include among the provisions of its structural injunction a requirement that Interior actually implement its Comprehensive Plan, as modified by the present opinion.

The reason that the Court has decided not to simply remand to Interior is that virtually nothing has been accomplished since 1999 to bring Interior into compliance with the fiduciary obligations it owes to the IIM beneficiaries. During the Phase I trial, Interior represented to the Court that its implementation of the Trust Asset and Accounting Management System ("TAAMS") would serve as the centerpiece of trust reform. Numerous witnesses testified that when implemented, TAAMS would allow BIA to "administer trust assets, generate timely bills, identify delinquent payments, track income from trust assets, and distribute proceeds to the appropriate account holders." Cobell v. Norton, 226 F. Supp.2d 1, 49 (D.D.C. 2002) (citation omitted) ("Cobell VII"). Indeed, one of Interior's proposed findings of fact during the Phase I trial stated that "TAAMS is, at heart, a data management system that contains all the essential

functions to enable BIA to meet the requirements of the 1994 Reform Act." Id. at 48 (citation omitted). Additionally, during the Phase I trial,

> [Interior] argued, in large part based on the testimony regarding TAAMS, that injunctive relief was not appropriate [in the present case]. The Department specifically stated that "[t]he

> testimony at trial showed that Interior is making good faith efforts to come into compliance with all legal obligations through promulgation and implementation of the HLIP. Plaintiffs have not shown that an injunction is necessary to prevent violations from persisting. There is no reason to conclude that an injunction is required to bring about compliance with these duties."

Id. (citation omitted).

However, on February 23, 2001, the very same day that the D.C. Circuit issued its Opinion affirming the Court's Phase I opinion, then-Chief Information Officer for BIA Dominic Nessi issued a memorandum to the Special Trustee. Nessi, one of Interior's principal witnesses during the 1999 trial, informed the Special Trustee "that trust reform is slowly, but surely imploding at this point in time." Id. at 19. It has subsequently become clear to the Court that TAAMS will never function properly. During the Phase 1.5 trial, former Special Trustee Paul Homan presented uncontradicted testimony that after spending several years and several million dollars developing TAAMS, Interior abandoned the TAAMS project. See Tr., Day 1, PM session (May 1, 2003) at 97:6-8 (testimony of Paul Homan).

It remains the case, however, that for Interior to comply with its fiduciary obligations to the IIM beneficiaries, it is crucial that it be able to access trust data in electronic form, including ownership information. Yet Interior has presented no plan to this Court describing any definite measures to satisfy that need. Indeed, its "Comprehensive Plan" is a plan in name only — the actual plan for bringing Interior into compliance with its fiduciary obligations is the To-Be Plan, which is not expected to be completed until March of 2004. Therefore, the Court views Interior's "Comprehensive Plan" merely as a next step in the process of Interior's bringing itself into compliance with its fiduciary obligations, because it is really only a plan to make a plan (namely, the To-Be Plan).

Thus, from the time that this Court remanded to Interior in 1999 until the anticipated completion

of the To-Be Plan in 2004, five years will have elapsed in which Interior has demonstrated virtually no progress in complying with its fiduciary obligations to the IIM beneficiaries. Interior has not shown that any of the breaches of trust identified in the Court's 1999 opinion have been corrected.[16] Nor, until 2004, will many of these breaches even be addressed. In that year, when Interior expects to issue its To-Be Plan, it will have been almost ten years since Congress passed the 1994 Act requiring Interior to comply with its duties to the IIM beneficiaries, including its duty to account. Yet not a single statement of account has been issued to a beneficiary since the passage of the Act.

At the close of the Phase I trial, this Court stated that, "given the long and sorry history of the United States' trusteeship of the IIM trust, the defendants' recalcitrance toward remedying their mismanagement despite decades of congressional directives, and the consequences of allowing these enumerated breaches of trust to continue, the court will retain continuing jurisdiction over this matter. It would be an abdication of duty for this court to do anything less." Cobell v. Babbitt, 91 F.Supp.2d 1, 7 (D.D.C. 1999) ("Cobell V"). At the present juncture, almost four years later, Interior has still failed to mend the breaches of trust enumerated in 1999. Additionally, Interior has informed the Court that it will not be able to submit to this Court its actual plan to bring itself into compliance with its fiduciary obligations until March of 2004, almost a full decade after the

[16] Indeed, in at least one aspect, the situation has gone from bad to worse. In 1999, BIA had a probate backlog of approximately 12,000 cases. Cobell V, 91 F. Supp.2d at 17. However, during the Phase 1.5 trial, Special Trustee Ross Swimmer that it was his "understanding that there are as many as 18,000 that are awaiting probate now." Tr., Day 41, AM session (July 2, 2003) at 71:13-14; see also Tr., Day 40, PM session (July 1, 2003) at 85:25 - 86:2 ("I believe that the number is around 18,000 that are either official or unofficial deaths, and they may or may not be at one phase or another of probate."). This represents an increase in the probate backlog by 50% since 1999. In at least one aspect, then, Interior's "trust reform" has actually resulted in further stagnation rather than reform.

passage of the 1994 Act, and five years since this Court remanded to Interior after the Phase I trial. Given these circumstances, the Court concludes that it would be an abdication of this Court's duty to remand back to Interior once again. Given the history of Interior's intransigence in the face of clear mandates from Congress and the courts to take steps to comply with its fiduciary obligations, the only reasonable conclusion is that remanding to Interior at the present juncture would virtually guarantee that this Court's orders will not be carried out. Accordingly, the Court will not remand to Interior. Instead, it will direct Interior to comply with the provisions of its Comprehensive Plan, including the completion of its To-Be Plan.

To ensure Interior's compliance, it will be necessary for this Court to prescribe a timetable for the implementation of Interior's Plan. Although the Court has concluded that this Plan, as amended by the relevant provisions of the structural injunction issued this date, represents a reasonable next step in the process of bringing Interior into compliance with its fiduciary obligations to the IIM beneficiaries, that conclusion is founded upon the premise that the plan will be implemented within a reasonable amount of time. Without knowing whether Interior expects to implement the Plan in the course of two, three, five, ten, fifty, or a hundred years, it is impossible for the Court to verify that premise.

In its January 6 Compliance Plan, Interior listed several specific tasks it intends to accomplish to bring itself into compliance with its fiduciary obligations to the IIM beneficiaries, together with time frames for the completion of those tasks. See Department of the Interior Fiduciary Obligations Compliance Plan at 50-51, 54, 58, 62, 76, 77, 83, 84, 94 (Defs.' Ex. 1). In its proposed findings and conclusions, Interior represents that these time frames "were developed after taking into account Interior's experience, advice from outside experts, statutory constraints, existing budget and

appropriation requirements, the need for consultation with Congress and tribes, and Interior's considered judgment of the time required to implement large-scale institutional changes." Defs.' Prop. Findings and Conclusions at 217. The Court will incorporate these time frames into a timetable to be included in the structural injunction issued this date. Additionally, the Court will incorporate into this timetable dates for the completion and implementation of the To-Be Plan, based on Special Trustee Swimmer's testimony during the Phase 1.5 trial that Interior plans to complete the To-Be Model in March or April of 2004, and Interior's representation in its Comprehensive Plan that its implementation of the To-Be Plan will take approximately fourteen months after the To-Be Model is completed.

The Court does not believe that it will take a great deal of time before the monitor's reports on Interior's efforts will demonstrate whether Interior is implementing the provisions of its Comprehensive Plan in good faith. This belief is based in part on the testimony of Fitzgerald during the Phase 1.5 trial:

> Q: Is there the necessary expertise, management skills at the Bureau of Indian Affairs to do that part of the reform[,] to bring themselves fully into compliance with their trust duties?
>
> A. I don't know. I don't. I don't think I can answer that question yes or no. I think the best I can do with that is that within the next year, we will know that.
>
> Q. If you were at the Office of the Comptroller of the Currency and you were evaluating this trust, and you were evaluating the management of the Bureau of Indian Affairs, what actions would you take?
>
> A. Oh, I think I would — you know, that has been testified to before, I do believe. If this were a department in a national bank, we would have closed it a long time ago, the OCC would have closed it a long time ago.
>
> Q. And would you have appointed a receiver or a different trustee?
>
> A. Yes, we would certainly look for a different trustee, and the way you usually do that is you go to the courts and you say, "This trustee is not up to doing the job. The Court needs to find a — appoint another trustee."

Q. And if appointing another trustee for whatever reason was not an option, would you consider appointing a receiver in that instance?

A. Sure.

Tr., Day 8, AM session (May 12, 2003) at 19:16 - 20:15. The Court has decided not to appoint a receiver to manage the IIM trust at the present time. This decision is based on the Court's conclusion that controlling precedent in this case requires that at this stage of the present proceedings, the appropriate remedy is a structural injunction to bring the institutional defendant into compliance with its legal obligations, together with the appointment of a monitor to report on the defendant's progress in complying with the provisions of the injunction. Within a year or so after the injunction takes effect, it will doubtlessly become clear from the monitor's reports whether Interior is actually complying with the provisions of the injunction that are intended to bring it into compliance with its fiduciary obligations to the IIM beneficiaries.

One final word is in order. The Court is mindful that in some aspects, the interests of the plaintiffs in this action — individual Indian trust beneficiaries — and the interests of the tribal trust beneficiaries may diverge. But the Court is also mindful that, without the input and support of the Indian Tribes, any proposed reform of the IIM trust will likely be doomed to fail. Therefore, even though the Tribes are not parties to the present case, the Court will make every effort to shape its remedies in a way that will not harm the interests of the Tribes. The Court invites amicus NCAI to submit additional amicus briefs in order to bring any important issues that may arise in the future to the Court's attention. Additionally, once the Court has appointed its monitor, the Court will direct him or her to serve each of his or her reports upon NCAI in order to keep the Tribes informed as to the progress of Interior's

implementation of the structural relief ordered this date. It will further direct the monitor to meet on a quarterly basis with representatives of NCAI in order to receive input from the Tribes in a timely manner, and to file a detailed report of all such meetings on the record in this case, in order that the Court may receive such input. It is the Court's sincere hope that these measures will minimize any tension that exists between the interests of the plaintiffs and the interests of the Tribes.

An order shall be issued this date consistent with the foregoing memorandum opinion.

Date: _____

_____
Royce C. Lamberth
United States District Judge