THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOISE PEPION COBELL et al.	)	
	)	
Plaintiffs	)	
	)	
v.	)	**Civil Action No.**
	)	**96-1285 (RCL)**
GALE A. NORTON	)	
SECRETARY OF THE INTERIOR, et al.	)	
	)	
Defendants	)	
	)	
	)	

FOURTH REPORT OF THE COURT MONITOR

I. INTRODUCTION

On September 17, 2001, the Court Monitor submitted his Third Report to this Court. It addressed the status of the BIA Data Cleanup and Management (BIA Data Cleanup) subproject. That Report also reviewed and commented on the accuracy and completeness of the substance of the BIA Data Cleanup chapters in the past Quarterly Reports submitted to this Court pursuant to its Memorandum and Order, *Cobell v. Babbitt*, 91 F. Supp. 2d 1 (D.D.C. 1999) at 59.

In the Third Report, the Court Monitor concluded: "The Interior Defendants' Quarterly Reports have consistently failed to provide this Court with a truthful, accurate, and clear picture of the status of BIA Data Cleanup." *Id.* at 34.

As one example of the basis for that conclusion the Court Monitor quoted and addressed a statement in the BIA Data Cleanup and Management Chapter of the Seventh Quarterly Report: **"The exact status of the BIA Data Cleanup and Management, including work performed by BIA personnel, will be in the next quarterly report."** *Id.* at 30-31 and 34. The Court Monitor opined:

> **"If the Secretary of the Interior was concerned about why the Special Trustee was not satisfied with the completeness or the quality of the information in this Seventh Quarterly Report, she need only have read this one statement. In promising to provide in the *next* report the *exact data cleanup status* and work performed by *BIA personnel*, the subproject manager admitted that the *previous* six Quarterly Reports had not provided that "exact" status and had only reported what DataCom had accomplished with the tasks assigned to its personnel."** *Id.* at 30, emphasis in original.

The Secretary of the Interior, in a memorandum dated August 29, 2001, entitled, "Seventh Quarterly Status Report to the Court," (**Tab 1**) had asked the Special Trustee for American Indians (Special Trustee) to give her a detailed explanation of his concerns as expressed in his Observations to Quarterly Status Report to the Court Number Seven (Seventh Quarterly Report). In her direction to him to supply her additional information about those concerns, she stated:

"In reviewing the draft seventh report, I was particularly drawn to your views as expressed in the section entitled 'Special Trustee's Observations'. I was pleased to note your assessment that 'The Secretary, the Special Trustee and the Assistant Secretary of Indian Affairs, are moving to strengthen the overall leadership and project management of the trust reform effort.'

However, in the final paragraph of the Observations, you noted a concern that '(t)he Special Trustee is not satisfied with the completeness or the quality of the information provided in this quarterly report.' Since I have not heard from you on this subject prior to my review of the draft, and since your office compiled the report, I assume your concerns were of insufficient severity or immediacy for you to recommend a delay in filing the report. If that assumption is incorrect and you believe that the draft report needs to be amended materially prior to filing, we need to know immediately. The Solicitor will call you later today regarding the immediacy of your concerns.

If your concerns are not of such a nature as to require a delay, *I nevertheless want to address your concerns quickly. As I am committed to provide the Court with reports that are both complete and of high quality,* please provide to me by close of business next Friday, September 8, 2001, a detailed explanation of your concerns regarding the deficiencies of the Seventh Quarterly Report. *I welcome* your thoughts for improving the readability and format of future reports. If there are weaknesses in the content of our reporting to the Court, please advise me of your recommendations of the actions *we need to take. We may need to prepare a supplemental report* that would further clarify the status of trust reform for the benefit of the Court.

In addition, we have been informed that the Department of Justice requires some level of certification of the contents of the seventh report prior to it being filed with the Court. *We will seek certification from the subproject managers who contributed to the report.* *Id,* emphasis added.

The operative full paragraph of his Observations (**Tab 2**) had stated:

"The Special Trustee is not satisfied with the completeness or the quality of the information provided in this quarterly report. As our investigations are carried further and we receive the analysis from EDS of all subprojects, we will implement changes to this report designed to improve the format, completeness, and content of future quarterly reports." *Id.* at 6.

The Special Trustee, in a September 10, 2001 memorandum entitled, "Seventh Quarterly Status Report to the Court," (**Tab 3**) responded to the Secretary of the Interior by stating that:

"Since assuming responsibility for compiling the Quarterly Reports for the Department with the third report, I have noted a number of concerns about specific areas of trust reform in the Special Trustee's Observations section of the Reports. Many of these concerns were expressed in terms of the serious and complex management problems faced by the Department. These concerns included, but are not limited to, the inability of the BIA subproject manager to obtain meaningful metrics to measure the progress of the BIA data cleanup effort and the continued failure of TAAMS to operate in an acceptable manner. *The delays in some critical subprojects suggest that those people involved in those projects do not have or cannot get or will not acknowledge an accurate description of problems present in the projects.* Therefore, the problems are either not addressed or addressed ineffectively. The successful reform of the Department's Indian trust asset management process depends on the objective analysis of the process, the candid communications of the results of that analysis, and the firm commitment to reshape the process where necessary." *Id*. at 31, citation omitted, emphasis added.

The Department of Justice (DOJ) submitted the Seventh Quarterly Report to this Court on August 31, 2001 as an exhibit to "Interior's Motion For An Extension Of Time To File Its Seventh Quarterly Report" (**Tab 4**). DOJ counsel to the Interior defendants, Ms. Sarah Himmelhoch, stated in that motion:

"Interior is requesting the additional time merely to allow for the concerns the Special Trustee has expressed generally to be detailed and fully resolved before the Seventh Quarterly Report is filed in final form…." *Id.* at 2.

On October 3, 2001, in a "Notice of Filing of Interior's Seventh Quarterly Report and Related Papers" (**Tab 5**), Ms. Himmelhoch stated:

As for the Seventh Quarterly Report, Interior and undersigned counsel conducted inquiries of each subproject manager to determine whether each subproject manager believed the report to be an accurate description of the status of the subproject under his or her supervision during the months of May, June, and July 2001. Certain subproject managers indicated that, in order to make that assurance to counsel, certain changes needed to be made to the Quarterly Report. Those changes are identified in the attached certifications or correspondence. Each of the other subproject managers has indicated either in writing or orally that the report as originally submitted was an accurate description of the status of the subproject under his or her supervision during the months of May, June, and July of 2001." *Id*. at 3.

The Seventh Quarterly Report has been amended and, according to the representation of the DOJ counsel representing the Interior defendants, has now been produced to this Court by the Interior defendants as an accurate description of the status of the subprojects reported therein.

This Fourth Report of the Court Monitor will be a review of that Quarterly Report with respect to the specific BIA Data Cleanup and Management Chapter that was the focus of part of the Third Report's discussion and conclusions.[1] However, this Report will first

[1] This Report will also address several other Chapters in the Seventh Quarterly Report due to the issues raised about them by several subproject managers and other DOI and BIA officials.

address the verification process carried out by the DOI at the request of the DOJ regarding the Seventh Quarterly Report.

II. THE VERIFICATION PROCESS OF THE SEVENTH QUARTERLY REPORT

A. Verification History

Prior to the submission of the motion for an extension of time in which to file the Seventh Quarterly Report, the DOJ had requested, in a letter to the Counselor to the Secretary, Michael Rossetti, dated August 27, 2001, entitled, "Cobell v. Norton, Civil Action No. 96-1285," (**Tab 6**) that the DOI return to the custom of verifying the Quarterly Report upon its submission to the DOJ. As stated by DOJ counsel in her letter:

"Because Justice has not had sufficient time or access to conduct its own verification of the contents of the various reports, it has relied upon Interior to verify those reports generally and assure Justice of their accuracy.

For the Third, Fourth, and Fifth Quarterly Reports, that assurance has been provided by a letter from Thomas Slonaker, Special Trustee for American Indians, who transmits the report with a letter that contains the statement: 'we require written input from all of our subproject managers, which is then edited and formatted. We use great care to verify the reports.' (A similar verification was provided by the Office of Policy, Management, and Budget for the First and Second Reports.)

As I stated in our telephone conversation last week, before the Justice Department can file the Seventh Quarterly Report, Justice needs a similar statement that Interior has taken the necessary steps to verify the accuracy of that report. This statement could come either from Mr. Slonaker (addressing the entire report), from another senior official (addressing the entire report), or from each of the individual project managers and Mr. Slonaker (each addressing his or her section of the report). Without such a statement, however, Justice will not be able to file the Seventh Quarterly Report (or future reports)." *Id.* at 1-2, citations omitted.

The Solicitor of the Department of the Interior, William G. Myers, and a subordinate attorney, Sabrina McCarthy, were sent copies of that letter.

On September 4, 2001, a memorandum from the Deputy Special Trustee, John M. Miller, entitled, "Extension of the Filing Deadline for the 7th Quarterly Report," (**Tab 7**) was sent to Ms. McCarthy. He stated:

"This is to recap and confirm our conversations of 8/31/01. I expressed the Special Trustee's opposition to the proposed motion to extend the filing deadline for the quarterly report based on the Special Trustee verifying the contents of the report. As I stated in a voice mail message and directly to you with Mike Smith present, the Special Trustee would not verify the report under any conceivable scenario encompassed by the proposed motion. As you are aware, I repeated this to the Solicitor when we met with him later in the afternoon.

I have not seen what was filed, but I hope DOJ did not represent a contrary position to the Court." *Id.*

In an interview the Court Monitor held with the Special Trustee following submission of the Seventh Quarterly Report on October 3, 2001, he confirmed his subordinate's rendition of his opposition to delaying filing on August 31, 2001 the Seventh Quarterly Report in order to resolve his concerns and his refusal to verify it when submitted. He also expanded on his reasoning. He had seen no possibility that he or BIA senior management would be able to resolve his concerns expressed in his Observations and later memorandum response to the Secretary within the time period requested in the DOJ motion for an extension of time.

Also, he would not be able to verify the accuracy of some of the subproject managers' reports in the short term due to the management and communication problems that he had addressed in his memorandum response to the Secretary.[2] He had previously discussed his position and refusal to verify the Seventh Quarterly Report with Messrs. Rossetti and Myers when they first approached him requesting that he provide that verification some time before Miller's meetings with the Solicitor and Ms. McCarthy on August 31, 2001.[3]

Following the Special Trustee's refusal to verify the Seventh Quarterly Report and his concomitant opposition to delaying the filing of the Seventh Quarterly Report, the Solicitor requested, by memorandum dated August 29, 2001, entitled, "Certification Regarding Status of Projects Reported in Seventh Quarterly Report Cobell v. Norton, Civil Action N0. 96-1285 " (**Tab 8**), that the Special Trustee's Chief of Staff send a "Certification Memorandum" to each subproject manager "presenting" an "opportunity" to each subproject manager to certify that he or she had provided complete and accurate information regarding the status of his or her project. The Chief of Staff complied with the Solicitor's request in a memorandum dated on the same day sent to all subproject managers enclosing the certification memorandum along with a copies of the Solicitor's memorandum request and the Special Trustee's draft Observations for the Seventh Quarterly Report (**Tab 9**).

In its motion for an extension of time to file the Seventh Quarterly Report, submitted to the Court on August 31, 2001, (*see* **Tab 4**) the DOJ stated, notwithstanding the Special Trustee's position on this representation provided to the Solicitor in writing and orally by either him or the Deputy Special Trustee, that:

---

[2] In fact, the Special Trustee did not verify the Seventh Quarterly Report filed on October 3, 2001 and left in the Report his untouched Observations expressing his concerns about the quality and completeness of the Quarterly Report.

[3] Although he did not remember the exact date of the discussion, he believed it was in conjunction with a discussion of the Secretary's proposed memorandum to him requesting his detailed explanation of his concerns about the Seventh Quarterly Report. As that memorandum was sent on August 29, 2001, the discussion about verifying the Report must have occurred sometime before that date and after receipt of the August 27, 2001, DOJ letter requesting that verification.

"As of the time of this filing, the Special Trustee, 'is not satisfied with the completeness or the quality of the information provided in (the Seventh Quarterly Report).' Because additional review time is needed to allow for the filing of a verified report, Interior respectfully requests an extension of 30 days, to and including October 3, 2001, for the filing of the Seventh Quarterly Report…."

Interior is requesting the additional time *merely to allow for the concerns the Special Trustee has expressed generally to be detailed and fully resolved* before the Seventh Quarterly Report is filed in final form, and will file sooner than October 3, 2001 if possible.
Id. at 1-2, citation omitted; emphasis added.

The Motion also noted (footnote 3) that the Solicitor's offering of an opportunity to certify the information provided by the subproject managers had only secured the necessary certifications from six of these managers. *Id.* Those certifications, however, included one by the BIA Data Cleanup and Management subproject manager that occasioned that Chapter's review in the Third Report of the Court Monitor.

Following submission of the motion to extend the time to file the Seventh Quarterly Report, the Solicitor again sought certification from each subproject manager in a memorandum sent on September 21, 2001, through the Assistant Secretaries for Policy, Management and Budget, Land and Minerals Management, Indian Affairs, and the Special Trustee (initialed by these officials) to all subproject managers (**Tab 10**). The memorandum stated in part:

"The Department of Justice requires certification of the reports prior to filing them with the Court. This requirement is found in the Federal Rules of Civil Procedure for the United States District Courts. The rule requires every attorney who presents a document to a federal district court to certify that the document is accurate "to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances." The rule applies not only to the 7th Quarterly Report, but to all future quarterly reports as well.

Prior to the filing deadline for the 7th Quarterly Report, the Office of the Solicitor worked through the Office of the Special Trustee for American Indians in seeking a statement from each Subproject Manager certifying that manager's portion of the Quarterly Report. *Not all managers provided statements prior to the filing deadline, thus necessitating the need for the extension of time…."* *Id.* at 1, emphasis added.

The memorandum included instructions for each subproject manager to follow: re-certify a past certification with the new attached certification; sign the new certification and include a detailed statement of the modifications made to the previous report; or, if he or she could not sign the statement, provide a detailed written explanation of why not. *Id.* at 3.[4]

The memorandum required that it be read and responded to by all subproject managers. All subproject managers did not respond in writing or sign the certification. Five

[4] This document, supplied as Exhibit 4 to the Notice of Filing, had only two pages. The second page was, apparently, erroneously marked page 3.

subproject managers did respond with the requested detailed explanations of why they would not sign the certification.

One memorandum, submitted by four subproject managers on September 27, 2001 (**Tab 11**), including the Principal Deputy Special Trustee, stated, in part:

- **In your memorandum you have not provided explanation or justification why Subproject Managers must 'certify.' As we read the memorandum, the requirement to certify under the Federal Rules of Civil Procedure rests with officers of the Court, not Subproject Managers.**

….

- **The Motion filled by the Department of Justice on Interior's behalf seeking a delay in filing the 7th Quarterly Report stated that the reason for the delay in filing was to afford time needed to allow for the concerns that the Special Trustee expressed generally '…to be detailed and fully resolved before the Seventh Quarterly Report is filed in final form….' As we read the Motion it was not, as your memorandum suggests, the absence of certifications from all Subproject Managers that occasioned the delay. In other words, receipt of the requested certifications would not appear to resolve the reasons given for the delay and the actions promised to the Court.**

- **Ethically, we are well aware of the Solicitor's role as the attorney and counselor to the Secretary. You and the Department of Justice represent Interior's interests. While not government attorneys, we must assume that each of us have some exposure to the possible legal consequences of the terms 'verify' and 'certify' in the *Cobell* litigation context. We simply are unwilling, given the litigation to date, to assume the attorney's responsibilities and stand 'in front' of them in the eyes of the Court….**

- **Moreover, at its base your request appears to be a simple repeat of the earlier 'opportunity' to certify presented to Subproject Managers in late August, but possibly more intimidating. We chose then not to avail ourselves of that 'opportunity.'**

….

- **Further, we cannot reconcile your order with the statement of the Special Trustee in the 7th Quarter Report that he is not satisfied with the completeness or the quality of the information provided in that Report. In response the Special Trustee was required to provide specific examples to the Secretary explaining some of his concerns with reporting in that Report. To our knowledge, the only response has been this request for certifications. Without an understanding of the Department's plans to improve reporting, our certifying the 7th Quarter Report would border on the foolhardy."** *Id.* at 1-2.

The fifth subproject manager who refused to certify the Seventh Quarterly Report had a somewhat different but just as troubling reason. In an undated memorandum to the Solicitor (**Tab 12**) the Appraisal Subproject Manager stated:

"I will not be signing or submitting the certification requested by your office. The information submitted to the Office of the Special Trustee for the 7th Quarterly Report does not include or reflect my professional opinion regarding milestone (K) of the High Level Implementation Plan. A meeting was held by senior management, while I was on travel status, and a decision made without my input. I was not consulted for my comments prior to the decision made by senior management to not realign the appraisal line authority to Central Office.

In the 6th Quarterly Report, the BIA had outlined a plan to realign the appraisal program. I was in the process of working on the realignment plan as indicated in the 6th Quarterly Report, when I was informed by senior management to cease work in regard to this milestone. According to the information I had received, senior management had made a decision to obtain a legal examination of the realignment from the Solicitor's Office…. I was not involved in the development of the document, nor can I attest to the validity of the information that was gathered and analyzed, as I was not fully involved in the research or analysis of the information.

As the Sub-Project Manager and technical expert for the Appraisal Program, I would like the record to show, that I do not agree with the document or the decision made by senior management to leave the appraisal line authority with the Regional Directors and Agency Superintendents…." *Id.*[5]

Faced with the refusal of five subproject managers to certify their reports in the Seventh Quarterly Report, the Solicitor's next proposed separate verification processes for the Seventh and subsequent Quarterly Reports. Both were outlined in the DOJ's Notice of Filing on October 3, 2001 (see **Tab 5**). The opposition by the subproject managers to the Solicitor's previous efforts to have them certify the reports was described as an "agreement on certain steps to improve the review of the Quarterly Reports:"

"Specifically, the 'surnaming' procedures for the Eighth and all future Quarterly Reports have been modified so that each subproject manager will review and surname his or her section of the Quarterly Report. As set forth in the Departmental Correspondence Handbook, the act of surnaming is a statement by that individual that he or she concurs with the 'content of the written document.' An individual who does not concur with the content of the written document must 'submit dissenting views in writing to the head of the Action office or Bureau stating the reason(s) for non-concurrence.' In addition, the Solicitor has informed undersigned counsel that, at the meeting of all subproject managers described in the preceding paragraph of this Notice, he advised all subproject managers *that concurrence in the 'content' includes a belief that the document is accurate to the best of the individual's knowledge*.[6] The Solicitor has informed the undersigned counsel that he intends to confirm his oral instructions in writing to the subproject managers as well as high-level managers who will be reviewing future Quarterly Reports….

---

[5] While this Report will primarily address the Seventh Quarterly Report's verification process and the substance of the BIA Data Cleanup and Management Chapter, it will also review this subproject's Chapter in light of the subproject manager's refusal to certify it.

[6] The Court Monitor attended this meeting and was present for the teleconference with the Solicitor. It was not clear that the Solicitor had clarified this understanding with the subproject managers. Several subproject managers, questioned by the Court Monitor after the filing of the Seventh Quarterly Report on October 3, 2001, did not recall hearing it nor understand that the definition of "surnaming" had been expanded to include a renewed certification of their future Chapters' accuracy.

As for the Seventh Quarterly Report, Interior and undersigned counsel conducted inquiries of each subproject manager to determine whether each subproject manager believed the report to be an accurate description of the status of the subproject under his or her supervision during the months of May, June, and July of 2001. Certain subproject managers indicated that, in order to make that assurance to counsel, certain changes needed to be made to the Quarterly Report…. Each of the other subproject managers has indicated either in writing or orally that the report as originally submitted was an accurate description of the status of the subproject under his or her supervision during the months of May, June and July of 2001." *Id.* at 2-3, citations omitted.

It was noted in footnotes to the Notice that DOJ counsel would request oral assurances from the subproject managers that future Quarterly Reports accurately reflected the status of trust reform. Also, some subproject managers had expressed concern regarding the process offered for certifications of the Seventh Quarterly Report and had been allowed to provide their assurances of their reports' accuracy orally to DOJ counsel rather than in writing. *Id.*

B. Review of the DOI Verification Process

The predicate review required for addressing the accuracy and completeness of the BIA Data Cleanup and Management Subproject Chapter and other Chapters in the Seventh Quarterly Report was to determine who verified the accuracy of the entire Seventh Quarterly Report. That determination appeared simple. It was not.

DOJ counsel requested that the Seventh Quarterly Report be verified as it had been in all Quarterly Reports up until the Sixth Quarterly Report; first by the Assistant Secretary for Policy, Management and Budget and, later, by the Special Trustee until he refused to continue that verification based on his concerns about the Quarterly Reports' accuracy and completeness.

DOJ counsel gave the Counselor to the Secretary and the DOI Solicitor several options in her letter of August 27, 2001. The Special Trustee, another senior Interior official, or the Special Trustee and each individual project manager could verify the accuracy of the Seventh Quarterly Report. But in each case, a senior DOI official was expected to verify the Seventh Quarterly Report for the Secretary of the Interior.

The Special Trustee refused the Counselor to the Secretary and her Solicitor's request that he verify the Seventh Quarterly Report on the basis of his oft repeated concerns that one or more of the subproject reports were not accurate or complete due to the management problems within the BIA or elsewhere. The Solicitor's subsequent attempt to offer the "opportunity" to the subproject managers to "certify" the information they provided for their chapters met with limited success; only six subproject managers provided that optional certification by the time the Seventh Quarterly Report was due to be filed on August 31, 2001.

DOJ's stated reason provided this Court on August 31, 2001 for the requested extension of time to file the Seventh Quarterly Report was to resolve the Special Trustee's concerns. But the Special Trustee had told the Counselor to the Secretary and the Solicitor that this would not be possible before that motion for extension was filed. Nor did he agree with the request for an extension of time based on this reasoning.

The Solicitor's "certification" process ensued after the Special Trustee, charged by the Secretary of the Interior with responsibility for all trust reform matters, informed the Secretary's Counselor and her Solicitor that the management and communication problems causing him to have concerns about the accuracy and completeness of the Quarterly Reports (not to mention the overall management of trust reform) could not be resolved in thirty days and, therefore, that he would not verify the Seventh Quarterly Report.

Subsequently, after the motion for an extension of time to file the Seventh Quarterly Report was filed on August 31, 2001, the Solicitor took a new tack. His September 21, 2001 memorandum required a response whether or not a subproject manager felt he or she could submit a certification. He received five negative responses by subproject managers who indicated exactly why they had not and would not sign certifications. Perhaps most concisely expressed, four of the subproject managers believed it was the responsibility of DOI senior management and their attorneys to resolve the concerns addressed by the Special Trustee and provide the Court with a verification of the Secretary's Seventh Quarterly Report. This was the process DOJ had asked DOI to accomplish. Those concerns' resolution was represented to this Court as the only reason for the requested extension of time to file the Seventh Quarterly Report.[7]

The subsequent "agreement" to allow the subproject managers to either certify, surname, or orally report to DOJ counsel on the accuracy of their reports in the Seventh Quarterly Report while still insisting that receiving these disparate assurances from the subproject managers was the equivalent of a verification by a senior DOI official is farcical. No senior DOI manager has been willing to verify or has verified the Seventh Quarterly Report as requested by the DOJ. Nor have the Interior defendants been able to resolve the management and communications problems that formed the basis for the Special Trustee's concerns expressed not only in his September 10, 2001 memorandum to the Secretary of the Interior but also stated in the October 3, 2001 Seventh Quarterly Report's Special Trustee Observations.

The question remains: who is the official that should be or was responsible for responding to DOJ's requirement that the report be verified regarding its accuracy? In the absence of a verification from the Special Trustee, who does not believe the filed Seventh Quarterly Report is yet accurate or complete, the only official who has the

[7] The Solicitor's explanation of the reason for the extension of time request to the subproject managers was not accurate as these four subproject managers had pointed out. It was not because the subproject managers had failed to provide the requisite certifications. The Interior defendants apparently told DOJ counsel that they would resolve the Special Trustee's concerns by October 3, 2001. The Court was so informed of this basis for the extension request.

ultimate responsibility for and authority over *all* subproject managers, either in conducting trust reform operations or reporting on the status of their activities, is the Secretary of the Interior.

The continual involvement in and direction of the verification process by the Counselor to the Secretary and her Solicitor to obtain the overall verification of the Seventh Quarterly Report by at least three different methods ending in a jumble of subproject managers' certifications, re-certifications with explanations, Chapter modifications, and oral assurances of the accuracy of their Chapters' content adequately support the conclusion that the requisite verification of the Seventh Quarterly Report was the ultimate responsibility of the Secretary of the Interior.

Why should this be so? First, this Court did not order the DOJ to obtain a verification of the Quarterly Reports it ordered it be provided in its December 21, 1999 decision. It stated:

"Beginning March 1. 2000, *defendants* shall file with the court and serve upon plaintiffs quarterly status reports setting forth and explaining the steps that *defendants* have taken to rectify the breaches of trust declared today and to bring themselves into compliance with their statutory trust duties embodied in the Indian Trust Fund Management Reform Act of 1994 and other applicable statutes and regulations governing the IIM trust." *Id.* at 59, emphasis added.

The Secretary of the Interior is the main "defendant" in the *Cobell v. Norton* litigation. As this Court noted in a subsequent paragraph to the above order: "Defendants Secretary of the Interior and Assistant Secretary of the Interior – Indian Affairs shall file with the court and serve upon plaintiffs the revised or amended High Level Implementation Plan." *Id.* The "defendants" are not the DOJ, the Special Trustee, or the subproject managers. Whether or not the DOJ received a written verification for the Secretary or her immediate subordinates in her name, she is the de facto signatory on the Seventh Quarterly Report and is the official responsible to this Court for its truthfulness, accuracy and completeness.

She recognized this legal responsibility and asserted her understanding of the importance to her in assuring the accuracy of the Seventh Quarterly Report's to the Special Trustee in her memorandum sent him on August 29, 2001 in stating that:

"As you know, *I am required to file quarterly reports detailing the progress of trust reform….*

….

As I am committed to provide the Court with reports that are both complete and of high quality….

If there are weaknesses in the content of *our* reporting to the Court, please advise *me* of your recommendations of the actions *we* need to take. *We* may need to prepare a supplemental report that would further clarify the status of trust reform for the benefit of the Court." *Id.* at **Tab 1**.

She also, parenthetically, was the decision maker on the manner of obtaining the information on which to base her verification of the Seventh Quarterly Report whether that method would prove sufficient or not:

"We will seek certification from the subproject managers who contributed to the report. *Id.*

The Seventh Quarterly Report now has been submitted to this Court by DOJ counsel after the requested extended filing period to resolve the concerns of the Special Trustee. Based on her acknowledged responsibility, the Secretary of the Interior has submitted a verification of the Seventh Quarterly Report and attested to its accuracy having, apparently, evaluated and resolved the Special Trustee's concerns to her satisfaction through the actions of her subordinates.[8]

III. THE BIA DATA CLEANUP AND MANAGEMENT CHAPTER

When this Chapter was last addressed in the Third Report of the Court Monitor, at page 34-35, the Court Monitor made a statement about that Chapter and previous chapters:

"The Quarterly Reports' BIA Data Cleanup And Management chapters have done no more than address individual tasks mainly performed by the DataCom subcontractor. Progress could be shown in their reports including the charts found in the appendixes to the Fifth and Sixth Quarterly Reports. Percentages of completion listed for the tasks gave a false sense that *BIA data cleanup personnel were making considerable progress.* But it was not reported that only *DataCom* was making progress on their individual tasks. By this method of reporting, BIA intentionally failed to address its Regions' massive hardcopy record backlogs, inoperable legacy systems, and data conversion and hardcopy encoding problems. No less an authority than the Special Trustee, upon the inquiry of the Secretary of the Interior, has now attested to the reality of this lack of truthful, accurate and complete reporting by BIA senior management with regard to the BIA Data Cleanup subproject in particular and trust reform in general."

What has changed in the newly filed Seventh Quarterly Report to make it an accurate, truthful, and complete portrayal of the BIA Data Cleanup subproject?

---

[8]It is ludicrous to expect this Court to accept the accuracy and completeness of the *entire* Seventh Quarterly Report on the basis of the oral or written certifications and assurances of the 15 subproject managers of their *individual* Chapters obtained by what some of those managers believed was overt intimidation by the Solicitor. However, DOJ counsel is responsible, under Rule 11 of the Federal Rules of Civil Procedure of the United States, for certifying to the truthfulness of this filing submitted under her signature. The 1983 Amendments to Rule 11 require that an attorney who signs a filing with a Federal Court must: 1) have read the document; 2) have concluded after a reasonable inquiry into both the facts and the law that "to the best of his knowledge, information and belief," there is good ground to support the document; and 3) be acting in good faith. Wright & Miller, *Federal Practice and Procedure,* Section 1334 at 55-56. The Advisory Committee has opined that the duty of inquiry standard is one of "reasonableness under the circumstances." *Id.* at 60-61. At least two subproject managers (Policies and Procedures, and Appraisals) interviewed by the Court Monitor asserted that, contrary to the representations of DOJ counsel to this Court, they neither certified or re-certified their Chapters nor were interviewed by DOJ counsel concerning those Chapters' accuracy and completeness. Whether the inquiry of DOJ counsel was "reasonable under the circumstances" might need to be weighed in light of these omissions, this Report's conclusions, and the refusal of the Special Trustee to verify the Seventh Quarterly Report as accurate and complete.

The subproject manager for BIA Data Cleanup was one of the managers who had certified the information provided by him in the first Seventh Quarterly Report filed with the motion for an extension on August 31, 2001. His certification listed no exceptions.[9]

The Subproject manager's certification at Exhibit 8 of the October 3, 2001, Notice of Filing (**Tab 13**), sought not only to clarify his previous certification and report but also provided a narrative to be attached to the Chapter modifying its content. The certification's statement read in part:

> **"I have attached a narrative to be added to the "Data Cleanup Overview By Region" section that clarifies a statement that was criticized by the Court Monitor in the final draft. *Although the statement that he highlighted was not provided by me originally,* I feel it is necessary to replace it with the attached text. I want to make it clear that we are not withholding information from the court. I have also added several other changes that will clarify information that I have provided."** *Id.* at 1, emphasis added.

This statement required further review as the sentence he referred to as not provided to him before his certification was the previously quoted: "**The exact status of the BIA Data Cleanup and Management, including work performed by BIA personnel, will be in the next quarterly report**."

He provided a replacement paragraph that stated:

> **"The BIA has been asked to assess and report on the status of data cleanup work accomplished by BIA staff. A regional data call has been initiated and results will be reported in the next quarterly report. Based on preliminary feedback, however, this will not be a significant percentage of the total. The Regional status reports below indicate contractor status followed by an overview of BIA staff work. The BIA sub-project manager will submit a white paper on the efficiency of collecting information that falls in to the category of *data cleanup that is conducted as part of regular job duties* to the Special Trustee during the next quarter."** *Id.* at 2, emphasis in original.

Following this paragraph, he added to the existing text of the "Overview By Region" a series of similar statements about BIA personnel work on data cleanup characterized by this statement about the Great Plains Region: "**This Region has no staff that are dedicated to data cleanup. Data cleanup is conducted routinely in the performance of BIA staff regular work duties.**" *Id.* However, there was no report on what the BIA personnel had accomplished on data cleanup during their regular work duties during the three-month period covered by the Seventh Quarterly Report. The subproject manager had still not provided that information as the previous statement had indicated a month previously.

The Court Monitor held two interviews with the BIA Data Cleanup and Management Subproject manager to determine why he had not collected any more information about the status of BIA Data Cleanup. The following is the substance of those interviews.

---

[9] *See* Third Report at 30 and **Tab 4G**.

The Subproject manager has only recently (July 2001) been assigned to supervise data cleanup. He is the Director of the Office of Trust Responsibilities with all BIA trust operations under his supervision. He had never been out to meet with the BIA data cleanup personnel and was not familiar with their activities. He relied on the reports of his Regional Data Cleanup Administrators, the DataCom contractor, and his immediate subordinate for preparing the Seventh Quarterly Report. He did not question the format of that report and trusted that the information he was given by his subordinates was accurate. His belief in the truthfulness and accuracy of that information was founded on his understanding that the individual statements and charts in the report accurately provided a picture of the majority of the work that was being accomplished on data cleanup.

He stated that he had not written the above-quoted sentence regarding the accuracy of the BIA Data Cleanup and Management report even though he certified the Seventh Quarterly Report's Chapter on data cleanup. He was unaware that BIA senior management and the Office of Special Trustee (OST) had changed his report prior to his certification and its filing with the motion for an extension of time to file it on August 31, 2001.

He did not review the final draft Chapter before certifying to its accuracy because of the short timeframe given him by the attorneys preparing to file the Chapter with that certification. He did not believe that the statement was accurate. He would not have agreed to it had he known it would be placed in the August 31, 2001 filing of the Seventh

Quarterly Report. He had since changed the statement to more properly represent his understanding of the status of data cleanup in the Regions.

Investigation and interviews of OST officials have confirmed that the alteration was made by OST in light of the perceived inaccuracies in the Subproject manager's August 31, 2001 data cleanup report and provided his BIA superiors for consideration. Apparently, no one informed him that the statement was added to the Chapter even though he was asked to certify the information provided in that Chapter.

Also, of significance, the interpretation that senior BIA managers were told by the Solicitor's Office to put on the Solicitor's August 29, 2001 memorandum offering them an opportunity to certify that they had provided complete and accurate information regarding the status of their projects to the Office of Special Trustee was that all they were certifying was that information, not the final Quarterly Report information submitted by DOI. As they were aware, and as confirmed by this and other subproject managers, their information might be changed by OST with agreement by their senior managers. However, they did not believe they had responsibility for certifying the information in the final Quarterly Report if it was changed unless they were asked separately to do so.

In turn, there is strong disagreement between OST and BIA managers over who was responsible for ensuring the final draft of the Quarterly Report was accurate which could

only be accomplished by discussing it with the subproject managers. If BIA managers did not agree with the OST changes, they often would not provide their surname or provided it with exceptions. The subproject managers were often not part of these dialogues.

Therefore, there is significant question regarding the accuracy of the written certifications provided to DOJ counsel by the subproject managers regarding the October 3, 2001 Seventh Quarterly Report. Also, the original certifications provided in the August 31, 2001 submission must be questioned regarding what they actually certified.

The changes made in that October 3, 2001 BIA Data Cleanup Chapter filing were meant to clarify the subproject manager's understanding of the data cleanup project's status. He did not believe that there was very much data cleanup work performed by BIA personnel. Also, what they were performing was an additional duty to their regular duties. He believed that most of the data cleanup was being accomplished by the DataCom contractor.

He believed that his Regional data call, that was a request for information of what each Region's BIA personnel were doing, will show they are not doing much. For that matter, he did not believe they have had the time or the resources to determine what they must do for data cleanup or how far they have to go to complete it. His white paper will be meant to show the difficulty with collecting information from BIA data cleanup personnel to better explain the status of data cleanup than is presently possible in the Quarterly Reports.

When queried as to why the Special Trustee and the Court Monitor were able to report on a much more detailed status of data cleanup in a number of Regions based on the BIA Data Cleanup meeting on August 28, 2001 in Albuquerque, NM, and he did not provide similar information in the Seventh Quarterly Report, he replied that he had not been provided a report by his subordinate who hosted the meeting. Nor had he attempted to learn the accuracy of the information provided at that meeting to the Court Monitor, an OST official, and the EDS contractor, and reported in the Third Report of the Court Monitor filed on September 17, 2001.

The sum and substance of the BIA Data Cleanup Manager's belief in the accuracy of his report was that the limited information he reported was, to the best of his knowledge, accurate. However, he repeatedly acknowledged that he did not know the extent of the information available about the status of the overall data cleanup project or the time and resources it would take to complete it.

A fair assessment of the reliance that his superiors and the Office of the Special Trustee placed on his understanding of the accuracy and completeness of his report was their addition of the language regarding the need to more accurately report in the future about the status of the data cleanup project without apparently even informing him of the decision to make the change. They allowed him to sign a certification of a report that had

been changed without his knowledge and which he would have declared inaccurate (whether he was correct or not) had he been aware of the change. However, his change to that statement in his most recent certification confirmed that previous statement. It stated he would have to put out a "data call" to determine what the BIA personnel were conducting in the way of data cleanup; a data call he was not certain would result in much usable information.

He strongly objected to the characterization of his report as untruthful based on his belief that reporting information on what is being accomplished by DataCom in the eight Regions and eight Agencies in which the contractor is operating was sufficient to declare his report truthful, accurate and complete. In his opinion, the fact that it provided the reader with little or no information to determine the status or progress of the overall data cleanup subproject and ignored or overlooked the major data cleanup problems facing *both* BIA personnel and the DataCom contractor was not misleading because he was not aware of those situations and could not report on them.[10]

Had he questioned those Regional managers responsible for the work of the BIA personnel that he believed were carrying out little data cleanup operations, he would have received information not unlike that that had been provided the Court Monitor at the August 28, 2001 Data Cleanup Meeting. An attempt to portray the Seventh Quarterly Report's BIA Data Cleanup and Management Chapter as accurate because it reported on the majority of the data cleanup work performed by DataCom belittles the effort of those BIA personnel that are faced with the major data cleanup work that is ongoing or left to be done. Just because no BIA Data Cleanup Manager had sought to capture or, apparently, understand the nature of data cleanup in the Regions being performed by BIA personnel, does not make the BIA Data Cleanup Chapter accurate or complete.

In addition to confirming the continued inaccuracy and incomplete status of this most recent BIA Data Cleanup and Management Chapter, his re-certification of the Chapter and his interviews also reconfirmed the lack of experienced and knowledgeable senior management, inadequate supervision of, and communication with, data cleanup personnel, and misunderstandings and misinformation between all levels of DOI and BIA management with regard to this subproject.

IV. THE BIA APPRAISALS CHAPTER

As previously noted, another Subproject manager took issue with the Seventh Quarterly Report's presentation of his Chapter. It also was changed without his apparent knowledge. The Appraisals Subproject Manager submitted an explanation memorandum

[10] The Subproject manager may not have intentionally sought to mislead this Court. However, his ignorance about BIA Data Cleanup and inability to determine its status do not cure the Interior defendants' problems with providing obviously incomplete and inaccurate data cleanup reports to this Court regardless of who was in charge of BIA Data Cleanup. One question to a Data Cleanup Administrator in any of the 12 Regions on the status of the data cleanup project would have disabused the most naïve supervisor of a belief that all was well and accurately reported in the Quarterly Reports. A "hear no evil, see no evil, and speak no evil" attitude does not make a report truthful.

to the Solicitor that was included at Exhibit 10 of the Notice of Filing (*see* **Tab 12**). In that memorandum, as previously reported, he took issue with the decision of the BIA senior management to leave the appraisal line authority with the Regional Directors and Agency Superintendents instead of placing it with him as the technical expert and Chief Appraiser for the Appraisal Program. His opinion of the proper line authority had been presented in the Sixth Quarterly Report but left out of the Seventh Quarterly Report due to the apparent decision of the BIA senior management based on a Solicitor's Office report commissioned by them.

While this omission may not make the overall Appraisals Chapter inaccurate or incomplete about the status of the Appraisals subproject, it is as troubling as the BIA Data Cleanup Chapter because it reveals a major rejection by BIA senior management of the touted Secretarial authority placed in the Special Trustee. Additionally, it displays a cavalier attitude about the need to accurately report the status of trust reform *including problems with subprojects' mismanagement* to this Court.

The Appraisals Subproject Manager stated it was his intent to place all of the appraisal staff under his line authority at the time of the Sixth Quarterly Report in May 2001. He thought his senior BIA management had agreed to that structure. The Special Trustee had noted his concern since at least the Third Quarterly Report filed in October 2000 with the independence and integrity of the BIA appraisal staff personnel who were under the supervision of the Regional Directors and Agency Superintendents. He had repeated his concerns as recently as August 15, 2001 in a memorandum entitled, "Revised Appraisals Report" (**Tab 14**) to the Acting Director of the Trust Management Improvement Project following his receipt of the BIA's legal study. That study recommended that the appraisers remain under the Regions and Agencies instead of reporting to the Chief Appraiser. The problem, as recognized by the Special Trustee and the Chief Appraiser, was summed up by the Special Trustee in his memorandum:

"I have reviewed the memorandum dated August 8, 2001…. After further reflection, I find I cannot accept the Revised Appraisals Report concerning subproject K that you submitted on July 25, 2001.

A properly executed appraisal process is essential to the appropriate investment of investable trust assets. That the existing process has been unequal to that task is the reason it is included in the HLIP for reform. An unreasonable delay in the timely completion of a trust realty transaction for lack of an appraisal is inconsistent with the Departments' policy 'to make the trust account reasonably productive for the beneficial owner' and is most likely a breach of trust. A backlog of 2000 appraisal requests and a delay in transaction approvals of 3 years, as noted in the HLIP, are unacceptable.

The appraisal process and the appraisers remain under the control of the BIA Regional Director or Agency Superintendent and the Chief Appraiser's role has become merely advisory in nature. That officer has no authority to effect action and, therefore, has no responsibility for the appraisal process.

….

Appraisers should not report to or be supervised by those in the Regional or Agency offices who are either directly or indirectly responsible for investment decisions….

The BIA Chief Appraiser should have full responsibility for and line authority over the appraisal process and the appraisers in the field. Alternately, the Department may create the position of Chief Appraiser for Trust Assets in either BLM or the Office of the Inspector General with line authority over the appraisers in the field…." *Id.* at 1-2, citations omitted, emphasis in original.

What was the most troubling part of this behind the scenes arabesque was not only the BIA's statement placed in the Seventh Quarterly Report to cover their apparent rejection of the Special Trustee's and the Chief Appraiser's course of action but that rejection of the Special Trustee's mandate by itself. The Seventh Quarterly Report's Appraisal Chapter stated, in part:

On August 6, 2001, the BIA proposed that the realty and appraisal staff be organizationally separated and that the appraisers would continue to report, albeit independently, to the BIA Regional Director or, in some cases, the Agency Superintendent. The headquarters-based BIA Chief Appraiser would support the process as an advisor to the Director of the Office of Trust Responsibilities.

By memorandum dated August 15, 2001, the Special Trustee rejected this proposal. It neither ensures the independence and objectivity of the appraisal staff nor addresses the structural characteristics that resulted in the backlogs and delays noted in the HLIP. As of this past quarter, the relevant milestones have been missed. The BIA has indicated that it welcomes the Special Trustee's comments and will work cooperatively with the Special Trustee to structure the process properly. The Special Trustee expects that the process to realign the appraisal authority be undertaken without delay." *Id.* at 25-26.

But the Special Trustee stated that this process should not be instituted. And he did not leave much room for maneuver. The BIA cannot just "welcome" the Special Trustee's direction under the Secretary of the Interior's July 10, 2001 Memorandum and Order[11] () regarding his authority. As stated in Order No. 3232:

"If, after consultation with the head of any bureau or office of the Department, the Special Trustee determines that any policy or practice that is within the control of such bureau or office either hinders or may hinder trust reform, the Special Trustee, with the advice and counsel of the Solicitor's Office, may issue written directives detailing the appropriate change in policy or practice. Unless the Secretary disapproves such directive in writing within 30 days of issuance, the directive of the Special Trustee shall have the force and effect of a Secretary's Order." *Id.* at 1.

The Special Trustee had sent this memorandum to the BIA's Acting Director of the Trust Management Improvement Project with copies to the Assistant Secretary for Indian Affairs and the Deputy Commissioner, Bureau of Indian Affairs. However, he stated to the Court Monitor that he did not consider it a directive to BIA to do what the Special Trustee said or take an appeal to the Secretary of the Interior. He did not think that he

[11] *See* Second Report, **Tab 10I**

would be answered with the apparent renewed decision of the BIA to not remove the appraisers from Regional and Agency supervision. However, the situation had reached a point where he might be required to consider issuing such a directive if the decision to follow his guidance is not forthcoming soon or the Assistant Secretary and Deputy Commissioner do not intervene to correct the situation.

Interviews with the BIA's Acting Director of the Trust Management Improvement Project and his assistant who had been involved in the preparation of the Appraisals Chapter of the Seventh Quarterly Report (although, according to them, not responsible for it) revealed that the issue was more one of lack of sufficient management of the Appraisals process and communication between senior BIA management and the Chief Appraiser rather than an intentional disregard of the Special Trustee's direction. As shown by a memorandum submitted by them to the Court Monitor (**Tab 15**), the lack of management and effective communications by all parties to the issue have resulted in confusion over the meaning of the Appraisals Chapter's language regarding whether the Special Trustee's guidance will be followed by BIA or not. That resolution is still outstanding.

But what the review of the Appraisals Chapter and the Chief Appraiser refusal to certify it does show is a complete lack of cooperation, coordination and understanding between OST and BIA on not only what should be placed in the Quarterly Report about the Appraisals subproject but how that project should be reformed and supervised. The Special Trustee expressed his concerns and preferred solution about the appraisal staff supervision in the Observations to the Third Quarterly Report in August 2000, over one year ago, by stating: "The Special Trustee is concerned that the independence and integrity of the BIA appraisal staff be established in accord with the Uniform Standards of Professional Appraisal Practice."[12] That change has not taken place and its implementation by BIA is still questionable.

As noted previously, although the DOJ counsel had sought to conduct a telephonic due diligence review with subproject managers who had failed to execute a certification, she did not conduct such a due diligence with the Appraisals Subproject manager even though he stated he could not certify the report. She cannot legitimately attest to the accuracy of this particular report.. The true story of the Appraisals project is that it remains mired in mismanagement, senior management indecision, and conflict between OST and BIA. There has been no resolution of the problems first pointed out by the Special Trustee in the Third Quarterly Report submitted to this Court on August 31, 2000.[13]

---

[12] *See* Second Report, **Tab 9I**.

[13] The original comments of the Special Trustee about the Appraisals project had been edited out of the final draft of the Third Quarterly Report and were much more critical of the BIA: "The two milestones scheduled for completion in this subproject were missed during the reporting period. Both related to key improvement initiatives designed to clarify the scope and the authorities for appraisals at the filed level. The information provided as justification for missing the deadlines was known when BIA established the dates in late February 2000. The Special Trustee considers the proposed March, 2001 milestone date for the evaluation of appraisal requirements under Task D to be an inordinate delay and is also uncomfortable with continuing to place appraisers under the direct supervision of the BIA Regional Directors." *See*

V. THE TAAMS CHAPTER

The TAAMS Subproject manager certified the TAAMS Chapter included in the October 3, 2001 filing of the Seventh Quarterly Report. It reported on the Integrated User Acceptance Test (IUAT) completed in June 2001 and discussed in the Second Report of the Court Monitor filed August 9, 2001. It noted that Electronic Data Systems Corporation (EDS) has been retained by the Special Trustee to provide an independent assessment of the TAAMS project. It reported that, pending the delivery of the EDS report, the TAAMS project management team was working on software fixes, the requirements database, training, testing, and the pilot testing in the Rocky Mountain Region.

A statement in section "S. Deployment to BIA and Tribal Sites," addressed the operational status of the current Title module reported as operational in Group A (Rocky Mountain, Southern Plains, Alaska and Eastern Oklahoma) Regions. The statement was made that "the exact status of each of the four regional offices will be provided in the next quarterly report.

In Quarterly Report to the Court Number Five, filed with this Court on February 28, 2001, TAAMS Chapter, "Section K1. Complete System Modification Effort – Title Portion," the following statement was made:

"Effective December 29, 2000, TAAMS was made the system of record for current title for the Rocky Mountain, Southern Plains, Eastern Oklahoma and Alaska Regions." *Id.* at 27.

Discussions with BIA personnel prior to filing the Second Report of the Court Monitor had elicited the definition of "system of record" to mean that whatever legacy system had existed prior to the TAAMS current title module deployment to these Regions, it would be turned off and its functions taken over by TAAMS. Thus, all reports and information provided to IIM account holders regarding current title would be provided by TAAMS from the data converted into that system from the legacy systems.

After subsequent investigation, the Court Monitor reported on this statement:

"So again, the Quarterly Report on February 28, 2001 continued to report misleading and incorrect information. The term "system of record" had been added to the lexicon of DOI terminology when "deployment" was changed to no longer mean "implementation." But "implementation" – when the system was working and LRIS had been turned off – was when TAAMS, or a portion of it, was designated as a "system of record." The TAAMS current Title module had been so designated on December 6, 2000 and reported by the new administration in February 2001 as the "system of record" for four Regional title offices. But those offices had not loaded their data or tested the system. Only one – Billings – to this day is using TAAMS current Title. That implementation did not occur until six months after it was announced it was the (sic) **operating as a system of record**. *Id.*, Second Report at 93.

Second Report, **Tab 9H**

Confirmation that the data to allow the TAAMS current Title to operate as a system of record capable of providing IIM account holders with title information had not been fully and accurately encoded or converted into TAAMS in three of the Regions was provided in the Third Report of the Court Monitor. The Data Cleanup Meeting held on August 28, 2001 had provided, among others, the status of data cleanup in the Alaska, Southern Plains, and Eastern Oklahoma Regions. None of these Regions had reached a point in their data cleanup and conversion activities to allow TAAMS to operate as a system of record as originally defined by BIA. The Rocky Mountain Region Land Title Record Office, visited by the Court Monitor, was the only Region that is using completely converted TAAMS data to provide requested Title Status Reports to the IIM account holders.

The "exact status" of the four Regional offices' use of TAAMS current title as reported by the Court Monitor could have been confirmed or rebutted and the status provided in the Seventh Quarterly Report by simply making as few as four phone calls. The Interior defendants are aware of or could easily have determined the status of their TAAMS' "system of record" in the four Regions. However little they may know without making those calls, they do know it bears no similarity to what was touted in the Fifth Quarterly Report eight months ago.[14]

Of interest, the TAAMS subproject manager, who was interviewed for this Report, stated that it was not his decision to place this statement in the TAAMS Chapter. His superiors made that decision, not unlike the similar BIA Data Cleanup subproject statement that was not even provided that subproject manager prior to his certification. On inquiry, it was determined that the statement was proposed by the OST in light of their inability to ascertain from the BIA what was the actual status of the TAAMS current title module's use in the four Regions where it had been designated a system of record. The senior managers within BIA accepted this proposal instead of reporting on that actual status.

The Seventh Quarterly Report's failure to provide this known or easily retrievable information is tantamount to withholding information from this Court and makes the TAAMS subproject Chapter, as summary in nature as it is, misleading and inaccurate. The decision to withhold or fail to check the information on the TAAMS' system of record casts doubt on the forthrightness of the Interior defendants sufficient to question, once again, their candidness with this Court.

[14] Two phone calls of the Court Monitor confirmed that the Alaska Region, which is encoding all hardcopy data into TAAMS, will interrupt that encoding to add hardcopy data to the system for a specific request for a Title Status Report so that they can use TAAMS to produce the report. The Southern Plains is still running TAAMS in parallel with their legacy system due to uncertainty over the accuracy of the data in TAAMS. The Eastern Oklahoma Region's records are located at county court houses and have not been entered into TAAMS to allow its use.

VI. CONCLUSIONS AND DISCUSSION

A. The Special Trustee's Concerns About The Accuracy and Completeness Of The Seventh Quarterly Report Remain Unresolved But Are Well-Founded

The Special Trustee informed the Secretary of the Interior that he could not verify the Seventh Quarterly Report because of his concerns about its accuracy and completeness. Specifically, as it bears repeating, he stated:

"The delays in some critical subprojects suggest that those people involved in those projects do not have or cannot get or will not acknowledge an accurate description of problems present in the projects. Therefore, the problems are either not addressed or addressed ineffectively. The successful reform of the Department's Indian trust asset management process depends on the objective analysis of the process, the candid communications of the results of that analysis, and the firm commitment to reshape the process where necessary." Third Report, **Tab 5A** at 31.

The review conducted of the reasons for the inaccuracies of Quarterly Report to the Court Number Seven in this Fourth Report bear out the Special Trustee's concerns as spelled out to the Secretary of the Interior. The Seventh Quarterly Report is inaccurate and incomplete with regard to, at least, the TAAMS and BIA Data Cleanup and Management Chapters. But those Chapters' lack of candor represents only a symptom of the severe DOI and BIA management problems rather than solely a desire to keep this Court in the dark. As the Special Trustee also informed the Secretary of the Interior:

"Many of these concerns were expressed in terms of the serious and complex management problems faced by the Department. These concerns included, but are not limited to, the inability of the BIA subproject manager to obtain meaningful metrics to measure the progress of the BIA data cleanup effort and the continued failure of TAAMS to operate in an acceptable manner." *Id.*

Those management problems have been addressed before in the last two Reports of the Court Monitor. The Secretary of the Interior sought to resolve them by her July 10, 2001 memorandum and order providing additional authority to the Special Trustee. She stated:

"One issue that I can address immediately is to clarify that the Special Trustee is in charge of trust reform. Toward that end, I have today issued a Secretary's Order that delegates additional authority to the Special Trustee to ensure his capacity to implement trust reform. I will look to and rely upon the Special Trustee to oversee and guide the successful completion of the High Level Implementation Plan…." Third Report, Tab 4E.

But the problems remain and, if anything, have increased in severity. The Appraisals subproject manager refused to sign the Seventh Quarterly Report certification offered him by the DOI Solicitor because he was not consulted about and disagreed with the senior managers' decision to strip him of his putative authority over the staff appraisers.

The Special Trustee had refused to accept the BIA management's decision to return that authority back to the Regions and Agencies and so stated in a memorandum to BIA. BIA management disregarded this decision even in light of the Secretary's Order and have proceeded to consider other options over the objections of not only their Chief Appraiser but also the Special Trustee.

The Special Trustee now must turn to the Assistant Secretary for Indian Affairs to resolve the matter. In the interim, as addressed in the Third Report of the Court Monitor, the inability of the Special Trustee to manage trust reform (even with his increased authority) without the continual involvement of the Assistant Secretary for Indian Affairs or the Secretary of the Interior to solve disputes about his direction will further delay trust reform. Even if he were given complete line authority over all trust reform subprojects it is questionable that he would receive the cooperation needed to institute change.[15]

The source of the problem with the truthfulness, accuracy and completeness of the Quarterly Reports and the inability of the Special Trustee to resolve his concerns or verify those reports is the lack of experienced, knowledgeable, and responsible senior management at least within the BIA. The underlying and deep-seated management problems spread throughout the trust reform subprojects, symptoms of which are the inaccurate and incomplete Quarterly Reports, are the result of this management vacuum and are perpetuated by it.

The Secretary of the Interior's subordinates could not resolve the Special Trustee's concerns in the thirty days requested of this Court to delay the filing of the Seventh Quarterly Report. Without a paradigm shift in the management structure of the BIA and the conduct of trust reform by the DOI, those concerns will not be resolved in the future.

B. The Secretary of the Interior Has Verified An Untruthful, Inaccurate, and Incomplete Seventh Quarterly Report

The subproject managers may have stated it the best. In replying to the DOI Solicitor's demand that they certify their reports or state why they refused, they replied:

"The Motion filed by the Department of Justice on Interior's behalf seeking a delay in filing the 7th Quarterly Report stated that the reason for the delay in filing was to afford time

[15] For instance, the DOJ counsel, in the Notice of Filing, spoke of the meeting held by the Special Trustee with all subproject managers, contractors, and high-level managers on October 2 and 3, 2001 as a beginning of the effort to improve coordination between OST and BIA. The Court Monitor attended that meeting. It was a good first effort by the newly appointed Deputy Special Trustee for Trust Systems and Projects to institute a new management culture and Quarterly Report format for all subprojects. However, in interviews with some of the BIA subproject managers following the meeting, they expressed their reluctance to change their operations on the direction of an OST official who does not have line authority over them and whose operational concept they do not believe they can manage. Paraphrasing what one subproject manager stated: "This merry-go-round will hit successive brick walls unless the supervisory line authority of the Special Trustee is clear to all. If the Deputy Special Trustee does not have supervisory authority over a subproject manager, he or she will not follow her direction unless it is what should be done." Trying to change the management culture of BIA without being able to hold managers accountable will not bring about effective trust reform.

needed to allow for the concerns that the Special Trustee expressed generally '…to be detailed and fully resolved before the Seventh Quarterly Report is filed in final form….' As we read the Motion it was not, as your memorandum suggests, the absence of certification from all Subproject Managers that occasioned the delay. In other words, receipt of the requested certifications would not appear to resolve the reasons given for the delay and the actions promised to the Court." Tab 7 at 2.

The Interior defendants did not seek to resolve the Special Trustee's concerns, if they even understood them; they only sought to resolve their problem in not being able to answer the Department of Justice's request that they have a senior official verify the Seventh Quarterly Report. No senior DOI official would touch that report with a ten-foot pole.

The Second and Third Reports of the Court Monitor had pointed out the inaccuracies in the past Quarterly Reports regarding both the TAAMS and BIA Data Cleanup subprojects. Apparently, senior BIA management could not explain those discrepancies or solve their underlying problems in time to make an accurate report to this Court that would not confirm the worst fears of the IIM account holders. So the Interior defendants sought to change the past verification process and have the subproject managers verify their own reports in whatever format they chose to submit them. As stated by the same subproject managers that questioned the Solicitor's stated reason for asking for the extension of time to file the Seventh Quarterly Report, they viewed the Solicitor's renewed attempt to have them certify their reports as no more than a ploy:

"Moreover, at its base, your request appears to be a simple repeat of the earlier 'opportunity' to certify presented to Subproject Managers in late August, but possibly more intimidating. We chose not to avail ourselves of that 'opportunity.'" *Id.*

They again refused to certify their reports even in light of the Solicitor's increased effort to elicit a response. This refusal required the Solicitor to make one final attempt that resulted in some subproject managers certifying their reports and others undergoing questioning by the DOJ counsel about the accuracy of their reports. At least two subproject managers' Chapters went uncertified without their being interviewed by the DOJ counsel.[16]

The Interior defendants did not carry out what this Court was told they planned to do – resolve the Special Trustee's concerns. That would have required resolving the management problems that have placed trust reform in the condition it is in today. Instead, they sought to resolve their more immediate problem – finding a way to avoid verifying a report that they knew to be inaccurate and incomplete, as the Special Trustee had outlined.

In so doing, they have involved themselves and the Secretary of the Interior in the

[16] What remains unclear is why the DOJ, having requested that the Interior defendants provided a senior-level verification of the Seventh Quarterly Report as provided by DOI in the past, accepted at least two alternative methods to obtain certifications by lower ranking subproject managers including accepting a role in a process of interviewing managers on their reports' "accuracy;" managers who would not provide even the limited certification later agreed to by DOJ.

presentation to this Court of a report that they seek to proffer as truthful, accurate, and complete. It has none of these attributes.

Their attempt to again avoid an honest presentation of the major management and systems problems that have delayed and hampered trust reform for years resembles the long and unabated dissembling before this Court found in the previous six Quarterly Reports. Only this time, the Counselor to the Secretary and the DOI Solicitor, representing the Secretary of the Interior, have taken an active role in its preparation and submission.

Who carries the ultimate responsibility for the repeated untruthful and knowingly inaccurate and incomplete submissions to this Court in the three Quarterly Reports submitted by this administration? Who was the sole official responsible for the actions of all DOI and BIA managers and employees in the conduct and reporting of trust reform activities? In the Secretary of the Interior's own words:

> **"I am required to file quarterly reports detailing the progress of trust reform….**
>
> **... I am committed to provide the Court with reports that are both complete and of high quality…."** *Id.* at **Tab 1.**

VII. REMARKS

The present administration's attempts to present this Court and the public with a picture of trust reform progress and avoid acknowledging the major BIA management and systems failures left untouched by their nine months' efforts are captured in microcosm in the review of their machinations to attempt to verify an inaccurate, untruthful, and incomplete Seventh Quarterly Report.

Those problems that have faced past administrations, reported by Congress on April 22, 1992 in the House Committee on Government Operations report entitled *Misplaced Trust: The Bureau of Indian Affairs' Mismanagement of the Indian Trust Fund,* H.R. No. 102-499 (1992), and sought to be corrected by that branch of government in the Indian Trust Fund Management Reform Act of 1994, have stymied this administration and the Special Trustee in their efforts to bring about trust reform to comply with that 1994 statute and this Court's December 21, 1999 memorandum and order. The continued existence of those problems and their imperviousness to resolution are no better exemplified than by the Special Trustee's own words regarding his concerns in his Observations in the Seventh Quarterly Report and his refusal to comply with the Counselor to the Secretary of the Interior and the DOI Solicitor's request of him to verify that Quarterly Report.

The past administration's deceptions of this Court regarding the Historical Accounting and the TAAMS' development and deployment, and both administrations' misreporting of the TAAMS and the BIA Data Cleanup subprojects in the Quarterly Reports, have their foundation in an institutional culture that has developed over decades to guard

against any other institution's interference with DOI and BIA management of trust operations. That culture is also evident in the awkward attempt of the most senior DOI officials to avoid being found responsible by this Court for their continued mismanagement and misreporting of trust reform activities. This was exemplified by their efforts to place responsibility on their subordinate subproject managers for the inaccuracies of the Seventh Quarterly Report rather than taking responsibility for the management failures that caused those inaccuracies to be possible.

Those inaccuracies are just a small window on the major underlying management problems associated with trust operations and trust reform Without experienced, responsible, and informed senior management capable of supervising their trust reform operations, the Interior defendants cannot develop accurate and complete Quarterly Reports. Without breaking down the institutional barriers thrown up by the DOI senior management and attorneys, and bought into by the past and present administrations, by the introduction of responsible and experienced trust management and trained and accountable employees, trust reform will continue to be a mirage for IIM account holders and a black hole for taxpayer dollars.

Congress created the Office of Special Trustee to bring responsible and experienced trust management to bear on this historical institutional failure. But it sought to have the Special Trustee provide oversight and advice to the DOI and its leadership who were thought expected by Congress to be willing to accept his *advice* rather than *direction* on trust reform. There is no clearer indication of the failure of this concept than the litany of concerns expressed by the Special Trustee in his Quarterly Report Observations since August 2000 about the mismanagement of trust reform projects and his repeated requests for authority to correct them. The most recent example of the lack of support he has received is the failure of the Secretary of the Interior to accept his advice and repeated requests and place line authority over all trust reform operations in him. His inability to bring about change in BIA trust management as shown by BIA senior management's rejection of his direction, revealed in the Seventh Quarterly Report regarding the Appraisals subproject, is another symptom of the institutional bias against outside influences over DOI and BIA operations.

The review of the preparation and verification process of the Seventh Quarterly Report would convince the most optimistic observer that, even if the Special Trustee were given sole authority over all trust reform operations, he and his staff could not proceed to reform the institution without a major overhaul of the senior and middle management responsible within DOI for trust operations. Present DOI and BIA senior management have no universal concept of the status of the major trust reform subprojects or when they will be successfully completed. They cannot and did not report that status in the Seventh Quarterly Report with respect to the major subprojects that form the core of trust reform activities. For the most part, the Special Trustee would have few qualified senior BIA managers on which to rely. And those managers have shown a reluctance to accept his authority due in part to past and present adversarial relationships between their offices and OST.

Finally, the Secretary of the Interior has not shown the support of the Special Trustee necessary to give solace to this Court or the IIM account holders that her past actions regarding questioning him instead of BIA senior managers regarding his expressed concerns about the Seventh Quarterly Report's accuracy and completeness will not be repeated. Also, her and her attorneys' actions regarding their efforts to have him or, upon his refusal, the subproject managers verify that Quarterly Report show a continued willingness of this administration to mislead this Court to protect their litigation posture regarding their and their subordinates' continuing management failures.

In conclusion, the Court Monitor's review of the preparation and verification process involving the Seventh Quarterly Report has confirmed a number of facts alluded to in past Reports and compiled here:

- **There is no one in charge of trust reform operations.** The Secretary of the Interior is the only official who has line authority over all DOI elements and personnel involved in trust reform throughout BIA, OST, the Bureau of Land Management, and the Minerals Management Service. The Special Trustee manages some of the trust reform projects and has limited authority given to him by the Secretary in July 2001 enabling him to attempt to influence other subproject managers' actions. But the Secretary must rule on any objections to his directives. BIA management is fragmented with a Byzantine management organization that provides little clear supervision of both BIA, Regional, and Agency employees performing or involved with trust reform activities.

- **There is no one with sufficient experience or knowledge to adequately describe for this Court the overall status of those trust reform operations.** The organizational structure for trust reform and the management culture involve little coordination between agencies, Bureaus, and Regions about trust reform and have produced no one who knows how everything is to fit together or the status of all trust reform projects. The Special Trustee has not been able to gain a foothold on an understanding of the status of trust reform sufficient for him to have more than an inkling about the problems facing that reform effort. He will not be able to institute the necessary management and communication changes to bring about trust reform or accurate reporting without a Herculean effort even if he receives the resources, personnel, and appropriations he would need to do the job.

- **There is no one who knows what is necessary or how to correct trust reform management, communications, and systems problems to bring about successful trust reform.** A clear indication that the above statement about the lack of knowledge of the Special Trustee or anyone else in DOI is the employment of EDS. Assuming EDS is capable of defining the management and systems deficiencies and recommending a course of action, who will carry it out? The senior managers and leaders needed to effectively carry out trust reform do not reside in the DOI or they would have done it before now.

- **There is no one who will tell this Court these facts.** The Special Trustee has tried to accurately express his concerns and has been criticized for his efforts. The Solicitor has most recently questioned him on why he would challenge the accuracy and completeness of the Seventh Quarterly Report. His responses and refusal to verify it did not elicit any admission from her that DOI did have serious problems that have gone unreported. The Secretary of the Interior directed the Seventh Quarterly Report's verification process charade carried out by her attorneys to continue to keep the major management and systems failures from the light of day and this Court.

  It may be possible that the EDS' reports commissioned by the Special Trustee on the TAAMS and BIA Data Cleanup subprojects to be submitted this month, and on all subprojects to be submitted later in December 2001, will be the first clear picture presented to this Court of the status of trust reform. If those reports survive the DOI review process and are provided to this Court, they may give it some comprehensive indication of the status and potential for the continued viability of the management of trust reform within DOI.

Those facts add up to one overall conclusion. The Court-directed DOI trust reform effort is broken and has not been and may not be capable of repair by the Interior defendants.

Pending the EDS reports, and assuming they will further delineate the management and systems failures that have placed trust reform as far behind completion as previously discussed in the first three Reports of the Court Monitor, what is the solution that this Court can enforce?

It can be expected that the Interior defendants will again claim progress, based on the EDS reports, that they now have identified the problems and will create a plan to address their solution. If so, there will be a fallacy to this reasoning.

The leadership of DOI in the present administration could have spent the early part of the last nine months identifying the obvious major management and systems problems inherent in the trust reform effort without the need for additional outside consultants. The Special Trustee had begun to identify and report on those problems long before they arrived. Instead, they have plied this Court, the Congress, the IIM account holders, and the public with statements of progress and metaphors reminiscent of the last Secretary of the Interior's testimony to this Court that the "ship would soon be brought into the harbor." But they based these words of reassurance and their initial decisions on the promises and advice of the very managers and attorneys who previously had delayed trust reform by their actions and misled this Court based on their own stated belief in the success of those actions.

What have they accomplished? The Interior defendants have put in place a new office responsible for the Historical Accounting project. That office does not expect to have a plan for even beginning this project until the middle of 2002. There is no projection on when it will be completed.

They have refused to provide the Special Trustee with the centralized authority believes he must have to direct the major management and systems changes necessary to begin effective trust reform. What they have given him for additional authority cannot be effective without the "cooperation" of the BIA and other agencies and, in its absence, the further support of the Secretary of the Interior. Some indication of that future cooperation and support can be gained from the past Reports of the Court Monitor regarding their actions to obstruct the Special Trustee's efforts at informing this Court of his concerns up to and including the Seventh Quarterly Report.

They now have offered this Court a picture of progress based on the "cooperation" expected between OST and BIA based on the first-ever meeting of these two organizations' senior and subproject managers. But some of these managers are part of the problems with, not the solutions to, trust reform. They are some of the same officials who have put trust reform in the state it is presently in due to their unwillingness to take the direction of the Special Trustee, or any senior DOI management, and their own unsuitability for the senior trust reform management and systems project management positions they hold.

The central question before this Court is not what is the status of trust reform but what is the answer to solving the severe leadership, management, and systems problems that continue to exist and multiply within DOI. Those are the causes that have placed trust reform in the state that it is in today and have encouraged the submission by the Secretary of the Interior of false and misleading Quarterly Reports.

One possible key to arriving at part of that answer to the questions which must be posed by this Court is an examination of the Interior defendants' actions not only regarding trust reform but also their obligations under this Court's December 21, 1999 order to fully and honestly apprise the Court of the accurate and complete trust reform status in the Quarterly Reports in general and the Seventh Quarterly Report in particular.

Copies of the Third Report of the Court Monitor have been provided to:

Sarah D. Himmelhoch
U.S. Department of Justice
Environment & Natural Resources Division
Environmental Enforcement Section
1425 New York Avenue
Washington, DC 20005

Dennis Gingold, Esquire
Keith Harper, Esquire
Elliot Levitas
Thaddeus Holt
%Native American Rights Fund
1712 N Street, N. W.
Washington, DC 20036

Hon. Alan Balaran
Special Master
1777 Pennsylvania Avenue, N.W.
Suite 1200
Washington, DC 20006

Respectfully submitted,

_____
JOSEPH S. KIEFFER, III
Court Monitor
D.C. Bar No.235200
(202) 208-4078

Date: _____