



the Office of Historical Trust Accounting to begin its work by developing, within sixty days, "a comprehensive description and timetable for completion of all steps that are necessary to staff and develop a comprehensive plan for a historical accounting that meets the Department's fiduciary Obligations to IIM beneficiaries." Id. Sec. 5(b). Moreover, within 120 days, the Office of Historical Trust Accounting is required to "identify the preliminary work that can be done immediately. Once that work is identified, detailed plans should be developed so that the affected bureaus and offices can begin the work." Id. Sec. 5(c).

In the explanatory memorandum that accompanied the Order, the Secretary emphasized that Interior would analyze all options for providing the accounting:

Through this comprehensive plan, the Department will analyze all options, not just statistical sampling, so that we can demonstrate to Congress, the Court, the IIM beneficiaries, and the public that we have identified the most cost-effective plan to complete the historical accounting and thereby satisfy the Department's fiduciary duty.

Memorandum from the Secretary to the Special Trustee, et al. (July 10, 2001) (Exhibit 2). With her corrective actions, the Secretary has heeded the Court Monitor's admonition to "clear away the obstacles caused by both [this] and the past administration's decisions." First Report of the Court Monitor ("Report") at 51.

The Secretary must emphasize that she concurs wholeheartedly in the Court Monitor's assessment that Interior's career civil servants "are professional, experienced, honest, and committed to doing their duty and to bringing about trust reform." Report at 50. In recognition of the knowledge and commitment of her employees, the Secretary just a few days ago invited them to participate in "listening meetings" which should provide Departmental leaders, including the Secretary herself, the opportunity to hear directly from the employees on their ideas and

suggestions on how to plan and conduct the historical accounting. While the Secretary is under no illusions that justice can be done in this matter quickly or painlessly, she is confident that with the assistance of the dedicated civil servants within Interior, and with the continued assistance of this Court, those hurdles can be addressed.

During her brief tenure in the Department to date, the Secretary has recognized that the problems inherent in administration of the program run deep, and can be overcome only through persistent effort and consistent, clear leadership. As the new management team is confirmed and takes office at the Department, affirmative efforts and leadership should become even more focused. It is our hope that with the Court and the Court Monitor's assistance, the Department can continue to push this program toward a new and constructive course.

**A. Brief Review of Prior Record**

There are certain aspects of the Monitor's Report for which additional comment may assist the Court in evaluating the progress Interior is making in providing an historical accounting for the IIM beneficiaries. In particular, Interior would like to make the Court aware of the actions it has taken to advance the accounting process before the establishment of the Office of Historical Trust Accounting this past July. In addition, Interior would like to assure the Court that the Secretary and her incoming appointees will have no patience for any suggestion that the Department disregard or diminish the importance of this Court's Orders.

To put certain matters in context, it may be helpful to review certain actions that began in the prior administration that may provide assistance with the continuing effort. While current management cannot fully represent the past administration's intentions, we attempt below to

portray preexisting efforts to work toward an historical accounting. As indicated above, much work, analysis, and self-evaluation remains to be done.

**1. Expert Reports Were Commissioned that Support the Development of an Accounting**

Expert reports were commissioned that not only began preparation for an accounting trial but also developed fundamental information that would guide the development of an accounting. This information includes accounting work based on the Paragraph 19 production, analysis of historical policy and business practices, and work towards reconciling accounts maintained on Interior's electronic databases.

First, Interior has expended a substantial amount of resources and money gathering documents responsive to Paragraph 19 of the Court's First Order for Production of Information. Ernst & Young was retained to reconcile the accounts of four of the five named plaintiffs using the documents located through the Paragraph 19 search effort. See Ernst & Young, Interim Final Report of Joseph R. Rosenbaum (August 9, 2001) (Exhibit 3).<sup>2</sup> Ernst & Young has completed an Interim Final Report on that analysis and concluded that the "documents gathered by the Department of the Interior support substantially all of the dollar value of the transactions shown in each of the IIM accounts. . . . These supporting documents provide sufficient contemporaneous evidence that the relevant transaction(s) occurred and were recorded accurately in the ledgers." Id. Ernst & Young's report shows, therefore, that it is possible that a search for all documents related to at least some of the individuals in the class is likely to result in identification of documentation for "substantially all" of the transactions in those individuals' IIM

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<sup>2</sup>The fifth named plaintiff, Mr. Maulson, did not have an IIM account during the period covered by the Paragraph 19 search.

accounts. Among other things, this information, combined with Interior's experience with the cost and practical difficulties in searching for the supporting documents, should assist decision-makers in assessing the costs and expenses associated with reconciling transactions in the IIM accounts.

Second, because the accounting could cover a period of time before the tenure of any current Interior employees, one of the significant first steps in the development of an accounting plan is the examination and analysis of the policies and procedures governing IIM accounts over time and the business practices of the offices involved. Such an analysis should permit Interior to make informed judgments about the types of documentation actually generated during relevant time periods, the manner in which such documentation was handled, and any prior reconciliations of IIM accounts that could inform or simplify the accounting efforts.

This historical analysis is underway. Specifically, Morgan, Angel & Associates, L.L.C. ("Morgan Angel") prepared a report on the Historical Development of Individual Indian Monies, which provides a comprehensive history of the origins and development of the IIM accounts that should allow Interior to evaluate critical time periods in the management of accounts, identify expected documentation, and more clearly focus its accounting project. See Exhibit 4.<sup>3</sup>

In addition, Historical Research Associates, Inc. ("HRA") performed a number of historical studies that should assist Interior. Most recently, HRA completed a series of case study

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<sup>3</sup>Morgan Angel also performed an analysis of the history of pooled investments of IIM funds, which should be useful in identifying the institutions that held IIM funds and the nature of the investments they held. See Exhibit 5. In addition, Morgan Angel recently completed a history of the audits of IIM funds between 1940 and 1990, which should inform Interior's efforts to design an accounting by identifying prior analyses of IIM funds which may be used as a basis for performing additional accounting work. See Exhibit 6.

reports for a sampling of agency offices. See, e.g., Exhibits 7-8.<sup>4</sup> In this way, HRA has provided Interior with information regarding the documents that could be expected to exist during particular time periods -- a question central to the planning and implementation of an accounting.

Third, Arthur Andersen, L.L.P. has made progress toward reconciling all non-interest collections of more than \$1 million that were recorded in the electronic system between 1985 and 1998. Specifically, Andersen has traced all but six of these transactions from their initial credit in the database to the distribution either by check, transfer memo, or deposit into an individual endpoint account. According to Arthur Andersen, in "this process, Andersen analyzed over \$1.2 billion in credit throughput and over 250 thousand transactions." Exhibit 9. Through this analysis, Andersen can generate a list of the supporting documents that need to be located in order to complete a transaction-by-transaction reconciliation for these transactions.

In addition to this "high dollar transaction" review, Andersen has completed other analyses of the database that could inform Interior's accounting. By analyzing the types of IIM accounts, their geographic distribution, and their distribution in value, Andersen has provided Interior with a tool in designing an accounting that is meaningfully targeted at each of the varied segments of IIM accounts between 1985 and 1998.

## **2. Interior's Work on the High-Level Implementation Plan and the Post-1994 Accounting Should Assist in Completing an Accounting**

In addition to the trial preparation work just described, Interior also engaged in trust reform efforts that may advance the accounting. The High-Level Implementation Plan ("HLIP"), as revised in February 2000, identified work that Interior plans to perform that should advance the

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HRA's case studies are voluminous. Therefore, Interior attaches only two of the more than thirty case studies that have been completed to date.

accounting. For instance, the HLIP-2000 provided that the Office of Special Trustee's data clean-up would include addressing the historical misuse of Special Deposit Accounts. See HLIP-2000 at 18 (Exhibit 10). Similarly, the HLIP-2000 called for further work on the discrepancies between account balances. As the HLIP-2000 recognized, these discrepancies between and among the Department and Treasury's accounting records have impacts on the accounting which need to be analyzed and addressed. See id. Work towards the accomplishment of these two elements of OST Data Cleanup should constitute part of the accounting.

Also, since 1995, the Office of the Special Trustee, through its Office of Trust Funds Management ("OTFM") has provided IIM account holders with a quarterly analysis of transactions in their accounts. The analysis starts with the opening balance (the closing balance of the prior quarterly analysis or, for the initial analysis, the ending balance in the legacy system in existence from 1985 through 1998), receipts, disbursements, and ending balance. The analyses are mailed to each account holder for whom an address is known. Each analysis has a telephone number contact at the servicing agency for account holders who have questions on their accounts.

**3. Summary Judgment Motions Were Filed to Address Issues on the Scope and Nature of the Accounting.**

The Court's December 1999 Opinion, while clearly declaring the duty to account, also acknowledged that significant questions remained regarding the nature and scope of the accounting owed:

It should be noted that the court is not ruling upon what specific form of accounting, if any, the Trust Fund Management Reform Act requires. For example, the court does not purport to rule on whether an accounting accomplished through statistical sampling would satisfy defendants' statutory duties. Moreover, the court will not now address other arguments that the

government may make in the future on the “historical” nature of the accounting (e.g., statute-of-limitations arguments).

Cobell v. Babbitt, 91 F. Supp. 2d at 49, n.32. In addition, the Court noted that:

significant legal issues that remain matters for the second phase of this case include: (1) whether an applicable statute of limitations, if any, precludes any of plaintiffs’ claims for an accounting; (2) whether an accounting accomplished through a sampling technique will satisfy the requirements of the Trust Fund Management Reform Act; and (3) the precise scope of plaintiffs’ certified class.

Id. at 32, n.22.

The issues may have an impact upon the design of an accounting. For example, in order to design an accounting, it is important to know to whom and for what time period the accounting will be done. As the Court noted, there is the open question of the application of the statute of limitations to some or all IIM beneficiaries. This limitation would have an impact upon the definition of the population for whom an accounting must be performed. These questions are the focus of summary judgment motions previously filed by Defendants.<sup>5</sup>

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<sup>5</sup>In a motion filed for partial summary judgment on May 12, 2000, Interior sought to resolve two important issues affecting the scope of the accounting duty: (1) whether the language of the Act places an outer boundary on the time period for which a duty to account is owed, and (2) whether the obligation to account was for funds actually held in trust and not for funds never actually held (such as the funds paid directly from a lessor to the individual Indian owners of property under the common “direct pay” practice). See Defendants’ Second Phase II Motion for Partial Summary Judgment (Re: Funds Not Deposited or Invested Pursuant to the Act of June 24, 1938) (May 12, 2000).

Defendants also filed a motion seeking resolution on the relationship between the current duty to account and the government’s compliance with the statutory “settlement of accounts” process from the early 1800’s through approximately 1951. Specifically, between 1817 and 1951, governing law required each Indian Disbursing Agent to submit his accounts, including those relating to IIM accounts, for settlement. Settlement consisted of a double audit – one by the Indian Office in Washington, D.C. and then by a second agency (either the Department of the Treasury (“Treasury”) or the General Accounting Office (“GAO”)). This settlement procedure provided a regular and specific procedure for checking the accuracy of accounts maintained on behalf of individual Indians and was the only accounting required by law at the time. Interior raised this issue for resolution through the filing of the Defendants’ Third Phase II Motion for

In sum, there were certain efforts underway to advance the accounting before the establishment of the Office of Historical Trust Accounting, including an historical overview and study of business practices, analysis of available documentation and data, efforts to reconcile high-dollar transactions, and the submission of summary judgment motions.

**4. Interior Respectfully Submits that there Has Been No Violation of this Court's December 21, 1999 Order**

The Monitor's Report could potentially be misinterpreted as rejecting any role for statistical sampling in the accounting process. While the Secretary has rejected a "sampling only" process, the Department has not rejected some type of statistical sampling as one of many elements of an adequate accounting process. In fact, this Court, the Court of Appeals, the Plaintiffs and Congress have all recognized that statistical sampling may play a role in providing the historical accounting. See, e.g., Cobell v. Norton, 240 F.3d at 1104 ("[T]he choice of how the accounting would be conducted, and whether certain accounting methods, such as statistical sampling or something else, would be appropriate . . . are properly left in the hands of administrative agencies." (emphasis added)); Cobell v. Norton, Order, p. 2, ¶ 2 (May 4, 1998) (emphasis added) ("For trial and trial preparation purposes, to the greatest extent feasible, this case shall be divided between that aspect which seeks to institute new trust management practices, often referred to as "fixing the system," and that aspect which seeks to obtain an accounting or approximation thereof and to correct the accounts of the members of the plaintiff class, often referred to as "correcting the accounts."); Pltfs' Mem. in Supp. of Proposed First Case Mgmt. Plan at 4 (Apr. 22, 1998) ("The problem is that, as everybody recognizes, the "system" is so badly

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Partial Summary Judgment (Re: Settlement of Accounts by Treasury and GAO) on September 19, 2000.

“broken” that a full accounting simply could not be rendered. Accordingly, we have proposed to attempt to correct the accounts on the basis of the best feasible approximation, which would be a statistical model based upon a mathematical projection from a sample set of accounts.”);

Misplaced Trust at 25-26 (emphasis added) (footnotes omitted) (Exhibit 11). In at least one case, the court approved of statistical sampling as an appropriate proxy for a full transaction-by-transaction accounting in an Indian trust case. See Minnesota Chippewa Tribe v. United States, 14 Cl. Ct. 116 (1987).<sup>6</sup>

**a. While Interior Was Required to Move Forward to Address the Complex Issues of an Accounting, an Immediate Transaction-by-transaction Reconciliation of All IIM Accounts Was Not Explicitly Required.**

Indeed, Interior was required to move forward in a responsible and deliberative fashion to design an accounting. Today, under Secretary Norton's leadership, Interior recognizes that concerted and responsible action is required. On December 21, 1999, the Court ruled that Plaintiffs “seek to enforce their statutory right to an accounting as that phrase is meant under the provisions of 25 U.S.C. §162a(d)(1)-(7) and 25 U.S.C. § 4011,” and that “plaintiffs narrowly seek to preclude defendants from acting contrary to law in abridging plaintiffs’ rights granted by statute and to affirmatively force defendants to comply with the law as stated by Congress.”

Cobell v. Babbitt, 91 F. Supp.2d 1, 27 (D.D.C. 1999). The Court also ruled that “to the extent plaintiffs seek relief beyond that provided by statute, their claims must be denied.” Id. at 29. In

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<sup>6</sup> The Report contains an extensive discussion of the factual background supporting its conclusions, including references to statements made by individual witnesses. By not addressing each witness statement and factual statement, Interior does not waive for itself or any individual employee or counsel the right to challenge the factual assertions contained in the Report should further proceedings arise. Order of Reference at 2, ¶ 5 (providing that “[i]n any proceeding before this Court, . . . findings of fact [contained in the Report] shall be reviewed de novo.”)

making its ruling, the Court found it necessary to address a portion of the accounting issues and thus declared one aspect of the scope of the accounting, as follows:

The threshold issue raised by Interior is whether the Trust Fund Management Reform Act imposes on the United States and, a fortiori, its trustee-delegates, the duty to render a "historical" accounting. In other words, the issue is whether the command that "[t]he Secretary [of the Interior] shall account for the daily and annual balance of all funds held in trust by the United States for the benefit of . . . an individual Indian," see 25 U.S.C. § 4011, really means "all funds." Defendants apparently claim that the phrase "all funds" means something less than all funds. Defs.' FF/CL, at 1 n.1. Plaintiffs claim that the Trust Fund Management Reform Act creates the duty to render an accurate accounting of all IIM trust fund money held by defendants in trust for individual Indians, without regard to the age of the funds.

Id. at 40-41 (footnote omitted). The Court noted that "[t]he disposition of this narrow (but threshold) issue leaves all other accounting issues as matters for the second component of this litigation, consistent with the government's position." Id. at 32.

The Court did not find that Interior had breached this duty. The Court's finding of breaches go only to the "statutory trust duties declared in subparagraphs II(2) - (4)." Id. at 58. The statutory trust duty declaring Defendants' duty to provide "an accurate accounting of all money in the IIM trust . . ." is found in subparagraph II(1). Id. This was not accidental -- as formulated by the Court, compliance with the trust duty to provide an accounting was to be the subject of Trial II. It would have been premature at the end of Trial I to declare that Defendants had breached the duty. In fact, the Court specifically noted that "[b]ecause the second phase of this lawsuit involves the actual accounting, the court need not (and cannot) address whether and to what extent defendants have breached their ultimate duty to render an accounting." Id. at 37, n. 26.

It is therefore not surprising that the Court's Order does not order an accounting. Rather it orders quarterly status reports "setting forth and explaining the steps that defendants have taken to rectify the breaches of trust declared today and bring themselves into compliance with their statutory trust duties . . . ." 91 F. Supp. 2d at 59. The "breaches of trust declared today" were those in subparagraphs II(2) - (4), pertaining to retrieval and retention of information needed for an accounting, policies and procedures regarding retrieval, retention, computer systems and staffing. Nothing in the Order directs a particular accounting process because there were still material issues to be resolved regarding the nature and scope of the required accounting. Nor does it order Interior to develop plans to collect documents from outside sources to support any particular accounting process.

The Court of Appeals did not believe that the district court had "ordered" any particular accounting, directly or indirectly. It affirmed the district court's finding that "Section 102 of the 1994 Act makes clear that the Interior Secretary owes IIM trust beneficiaries an accounting for 'all funds held in trust by the United States for the benefit of an Indian tribe or an individual Indian which are deposited or invested pursuant to the Act of June 24, 1938.'" Cobell v. Norton, 240 F.3d 1081, 1102 (D.C. Cir. 2001). But it plainly contemplated that the accounting would be done by an administrative process that would be reviewed when completed. Id. at 1110.

**b. The Appeal of the Court's Order Was Appropriate**

The Report makes reference to the Court Monitor's conclusion that the Federal Register notice process was the "price" that Justice exacted from Interior in order to file the appeal, and suggests that the "primary objective" of the Federal Register notice process was to support the appeal, rather than a means for making a good faith determination of how best to do a historical

accounting. See, e.g., Report at 43-44. It is clear that the past administration would vigorously dispute that statement and its implications.

That there were legitimate reasons for appealing this Court's December 1999 Order is shown by the fact that the Court itself, *sua sponte*, certified that Order for interlocutory appeal, having made the required finding that the Order involved "a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation . . . ." 91 F. Supp. 2d at 57. The appeal raised a number of significant issues, on behalf of both Interior and Treasury.<sup>7</sup>

**c. The Department Did Not Violate this Court's Prior Orders in the Approach Selected for Collection of Information from Third Parties**

Interior also respectfully takes issue with the Report's conclusion that the "Collection of Missing Information from Third Parties Breach project in support of this accounting has never been in compliance with this Court's order having been based on the Interior defendants' litigation position that the collection of missing information to support the accounting need only be from 1994 forward." Report at 42-43. First, the Report's conclusion does not recognize that Interior fully anticipated further collection work would be needed for the pre-1994 time period. This point was made by Interior on March 1, 2000, when it submitted to the Court a "Report on Collecting Information from Outside Sources." In that document, Interior informed the Court that it had an initial plan that covered the period from October 1994 forward, but that "[t]he

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<sup>7</sup>As confirmed by the Court of Appeals, decisions on how to satisfy Interior's accounting obligation are properly left in the first instance to the Secretary. Representatives of the past administration would no doubt argue that it is common practice for an agency to consult with the affected community as part of the informal agency decision-making process and the Federal Register Notice was part of such a process.

approach for providing information to account holders for the prior period will be determined after the proposed information gathering with account holders, their representatives, and other interested parties," i.e., after the completion of the process announced in the April 2000 Federal Register Notice.

In short, to allow for progress towards rectifying this breach, Interior determined to divide its approach to the accounting at a logical break point, the date of passage of the American Indian Trust Fund Management Reform Act, October 25, 1994. This Court has declared that Interior's duty to account was the creature of, and controlled by, statute. Cobell v. Babbitt, 91 F. Supp. 2d at 30 ("Whatever the scope of the government's legal duties under the IIM trust, the source is statutory law."). The 1994 Reform Act was the watershed statute relied upon by the Court to declare this duty.

Second, the relatively clear and recent guidance provided by the 1994 Reform Act left far fewer policy questions to be decided before Interior could develop a plan for gathering documents and performing an accounting for the period after 1994. The duty to account by providing the specific information identified in the 1994 Reform Act (25 U.S.C. § 162a(d)) was directly applicable to post-enactment trust activity. Accordingly, there was less to be resolved in terms of deciding what records would be necessary for such an accounting. Moreover, given the relative recency of transactions since the passage of the Trust Reform Act, there was a greater likelihood that missing records could be obtained from third parties.

There was also a more compelling pragmatic reason for deferring development of that portion of the Collection of Records from Outside Sources Plan that would address transactions that occurred prior to the enactment of the 1994 Trust Reform Act. In order to determine how to

establish written policies and procedures for collecting from outside sources missing information necessary to render an accurate accounting of the IIM trust (91 F. Supp. 2d at 43), Interior would first need to determine the nature and scope of the accounting to be conducted. That is, Interior needed to determine what must be accounted for, for what period, and in what level of detail. Only then could one begin to assess what records were necessary to accomplish the task and how to deal with the problem of obtaining records from outside parties.

## **B. CONCLUSION**

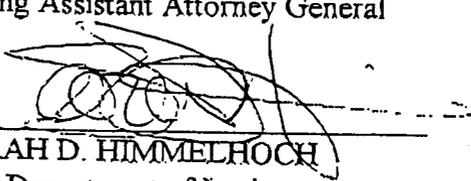
In sum, the Secretary openly and unequivocally acknowledges that significant work remains in planning and implementing the accounting, and is working toward that goal. She has established the Office of Historical Trust Accounting and set deadlines for actions that should work to accelerate, not delay, the ultimate provision of an accounting. See Cobell v. Norton, 240 F.3d at 1110 (finding the court has jurisdiction to monitor Interior's actions to determine whether

"the Department takes steps so defective that they would necessarily delay rather than accelerate the ultimate provision of an adequate accounting . . .").

Dated: August 10, 2001

Respectfully submitted,

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CERTIFICATE OF SERVICE

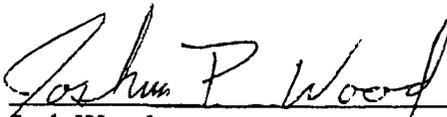
The undersigned hereby certifies that on August 10, 2001, a copy of the foregoing  
**DEPARTMENT OF THE INTERIOR'S RESPONSE TO THE FIRST REPORT OF THE  
COURT MONITOR**, was served on the following counsel by placing a copy in the United  
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