UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
Plaintiffs,	)	Civil Action No. 96-1285 (RCL)
v.	)	
GALE A. NORTON, et al.,	)	
Defendants.	)	

DEFENDANTS' PROPOSED FINDINGS OF FACT

AND CONCLUSIONS OF LAW FOLLOWING CONTEMPT TRIAL

Defendants Gale Norton, in her official capacity as Secretary of the Interior, and Neal McCaleb, in his official capacity as Assistant Secretary of the Interior for Indian Affairs (collectively "DOI" or "the Department"), submit the following proposed findings of fact and conclusions of law following the contempt trial held in this case between December 10, 2001 and February 28, 2002.

Introduction

Since Secretary Norton and Assistant Secretary McCaleb took office, they have discharged their duties arising out of the federal government's individual Indian trust. They have taken concrete steps to (1) reform a trust beset by more than a century of neglect and (2) advance the historical accounting of money owed to the beneficiaries. The most significant issue in these contempt proceedings is whether Secretary Norton and her team will continue the reforms and advance the accounting free of the stigma of contempt that would surely undermine the very efforts that the beneficiaries deserve.

If the past year is prologue, the Court has sufficient reason to stay its hand and not find contempt. Under Secretary Norton's leadership:

1 * A team of senior political managers with proven problem- solving skills has been recruited, appointed and tasked to identify and solve the problems.

2 * The Department's previous position that an accounting should commence with 1994 has been reversed and modified to commence at least with 1938.

3 * A management consulting firm, EDS, has been retained to review thoroughly, critically and

independently the status of trust reform.

---

4 * The Deputy Secretary has been placed in charge of trust reform, thereby providing the focused and unified leadership that had previously been lacking.

5 * The Office of Historical Trust Accounting has been established and initially staffed.

6 * The quarterly reporting system has been overhauled and improved.

7 * A reorganization plan has been developed and consultation with American Indians is occurring.

8 * The Office of Indian Trust Transition has been established and initially staffed.

9 * Efforts to fund and extensively improve trust data security have commended.

10 * The Secretary and other departmental leaders have testified before both houses of Congress regarding problems and the opportunities for both administrative and congressional solutions.

These actions compare quite favorably to the status quo inherited by Secretary Norton upon her arrival at the Department. Trust reform and accounting are benefitting from the infusion of new ideas, bigger budgets, more staffing, and greater awareness of the root problems. And this progress has occurred during a time when certain key departmental personnel have been obliged to step aside as a consequence of Plaintiffs' motions for contempt.

To be sure, the Secretary and Assistant Secretary appreciate the obvious frustration and the beneficiaries with the lack of discernable progress since the Court's judgment was entered over two years ago. They recognize the complexity and imperfections of the existing system. Indeed, had the Department made more progress in the last two years in

complying with the Court's order and in reforming the trust in the decades that preceded this litigation, perhaps the matter would not be before the Court.

But that is not the reality of the moment. The reality is that the Secretary and Assistant Secretary face possible contempt findings. Should that occur, opponents of reform will redouble their efforts to muster tribal, congressional and public opposition to reform of the trust, as they have during both previous and current administrations.

At the close of this trial, the evidence portrays not a pattern of contemptuous conduct but instead a series of efforts to implement trust reform measures, and to report to this Court upon those measures, admittedly efforts that sometimes were not as effective as they could have been. The overall plan contained in the revised High Level Implementation Plan (“HLIP”) not only guided trust reform efforts but also framed the reports submitted to this Court. Hard experience has revealed the HLIP to be inadequate in both settings; new and better integrated reform measures and reporting structures are taking its place. When the record adduced at trial is examined against the rigorous standard required for civil contempt of proof by clear and convincing evidence _ and further examined in light of the equally rigorous elements of proof to establish fraud on the court _ that record is seen to reflect not contempt but a mix of ideas and actions in a complex environment that sometimes yielded progress and sometimes did not.

Plaintiffs' proof with respect to the first specification _ the only specification that is framed as the alleged violation of an order _ cannot support a finding of contempt because the provision that DOI is alleged to have violated was issued as part of a declaratory judgment, and well established Supreme Court and D.C. Circuit case law establishes that

alleged noncompliance with a declaratory judgment cannot serve as the basis for a contempt finding. In addition, even if such an order had been issued, the evidence establishes that, although perhaps fitfully started, and having changed dramatically in July 2001, such a project has certainly been initiated with the

creation, staffing, and efforts of the Office of Historical Trust Accounting.

The remaining four specifications are framed not as violations of an order, as is typical for contempt proceedings, but instead as alleged fraud on the court. In addressing allegations framed as fraud on the court, courts have required clear and convincing evidence that the alleged contemnor:

> ... has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party's claim or defense.

Auode v. Mobil Oil Corp., 892 F.2d 1115, 1118 (1st Cir. 1989). And the cases in which courts have found this high standard to be met have generally involved egregious and uncontroverted proof that a party deliberately sought to interfere with the adjudication of the matter. Plaintiffs cannot meet this high standard. There is, for example, no basis in this record to support contempt for the second specification, which is alleges a "fraud on the Court by concealing the Department's true actions regarding the Historical Accounting Project during the period from March 2000, until January 2001." During the period from March 2000 to January 2001, the Department took several steps towards the historical accounting project, all of which were reported to this Court.

The evidence on the third specification, which alleges a fraud on the court by failing to disclose the status of TAAMS in the fall of 1999, is straightforward. DOI has acknowledged that it should have informed the Court of the delays in the TAAMS system development that occurred in the second half of 1999. Indeed, every witness who testified on the subject at the recent trial has agreed that high-ranking DOI officials affirmatively decided to disclose the nature of these delays to the Court, and generated and distributed drafts of such a report.

The evidence relating to the fourth and fifth specifications _ which generally allege fraud on the court in disclosures about TAAMS, BIA Data Cleanup and IT Security _ is voluminous. As Secretary Norton acknowledged in DOI's Eighth Status Report, DOI's reporting to the Court on these issues has not always been as forthcoming as it should have been, and it plainly was not of the quality that the Court and the beneficiaries expect. But it was not fraud on the court. DOI has disclosed the most fundamental problems facing these projects. The "Observations" included within the TAAMS and BIA Data Cleanup sections of the revised HLIP, for example, recounted in great detail the many substantial problems and challenges facing those two projects. And the portrait of these two projects presented at trial _ though not nearly as positive as DOI originally had planned _ also shows that there has been reason for pockets of optimism about the projects during the reporting period. There have also been many frank disclosures to the Court over the past two years about the obviously poor state of IT Security that remove any possible inference that DOI affirmatively sought to mislead the Court about this issue. When the Court carefully distinguishes the admitted management problems in these areas, on the one hand, from the disclosures that have been made to the Court, on the other, it is clear that there has been no fraud on the court.

Findings of Fact

I. The Show Cause Orders

1. This Court's November 28, 2001 Order ordered DOI to show cause why they should not be held in contempt of Court for:

11 * Failing to comply with the Court's Order of December 21, 1999 to initiate a Historical

Accounting Project;

12 * Committing a fraud on the Court by concealing the Department's true actions regarding the Historical Accounting Project during the period from March 2000, until January 2001;

13 * Committing a fraud on the Court by failing to disclose the true status of the TAAMS project between September 1999 and December 21, 1999; and

14 * Committing a fraud on the Court by filing false and misleading quarterly status reports starting in March 2000, regarding TAAMS and BIA Data Clean-up.

2. On December 6, 2001, this Court added an additional specification, ordering DOI to show cause why they should not be held in contempt for:

1 * Committing a fraud on the Court by making false and misleading representations starting in March 2000, regarding computer security of IIM trust data.

3. The facts relevant to these specifications will be addressed below. Section II will address DOI's efforts to carry out a historical accounting, which is relevant to the first two specifications of the November 28, 2001 show cause order. Section III will address DOI's TAAMS and BIA Data Cleanup subprojects, which are relevant to the third and fourth specifications of the November 28, 2001 show cause order. And Section IV will address IT security, which is relevant to the single specification set forth in the December 6, 2001 show

cause order.

II. Historical Accounting

4. The starting point for addressing the facts of the historical accounting project is this Court's December 1999 memorandum opinion and declaratory judgment. In its judgment, this Court did not address a project directly or specifically require a “project.” Instead, it declared that the Act obliged Defendants to provide an accounting of all money in the IIM trust:

> Pursuant to the Declaratory Judgment Act . . . the court HEREBY DECLARES that:
>
> 1. The Indian Trust Fund Management Reform Act, 25 U.S.C. §§ 162a et seq. & 4011 et seq. requires defendants to provide plaintiffs an accurate accounting of all money in the IIM trust held in trust for the benefit of plaintiffs, without regard to when the funds were deposited.

Cobell v. Babbitt, 91 F. Supp. 2d 1, 58 (D.D.C. 1999). In declaring the duty of the Secretary, this Court was careful to explain that it declined to address what form of accounting would meet the Secretary's statutory obligation:

> 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. . . .

Cobell, 91 F. Supp. 2d at 40 n. 32, aff'd. 240 F.3d 1081, 1103 (D.C. Cir. 2001)(“[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.”)

5. Defendants will address the first two specifications chronologically. Therefore,

Defendants address the true nature of their actions between March 2000 and January 2001 before responding to the initiation of the historical accounting project. As to both specifications plaintiffs have failed to adduce clear and convincing evidence that would support a finding of contempt on either, and this Court should discharge the order to show cause on the first two specifications.

A. DOI Has Disclosed to this Court the True Nature of its Actions.

6. Against this backdrop, the Department in early January 2000 decided that one method to gather information on the shape that a historical accounting project should take was to initiate a Federal Register notice requesting comments on a variety of approaches. 65 Fed. Reg. 17521 (April 3, 2000); see Testimony of Thomas Thompson, at 44; (See footnote 1) Thompson 700; Lamb 2718. As the notice announced, it initiated a process to acquire information, not only from interested IIM account holders, but also from interested segments of "the public." 65 Fed. Reg. 17521. Because the process involved meetings with Plaintiffs, the Department first sought this Court's permission to meet with members of the Plaintiff class before publishing the notice.

7. Although Mr. Thompson, the Principal Deputy Special Trustee, was not present when the decision to initiate the Federal Register process was made, Thompson 43-44, he understood that one of its purposes was to take the initial steps toward a historical accounting:

Q. So your understanding of what was being proposed is what

today?

A. My understanding was that the -- that there was a move to produce a Federal Register notice as the commencement of a process to complete an accounting for the IIM accountholders based on the Court's decision of December of 1999.

Thompson 44. Mr. Thompson also reported that one purpose of the Federal Register process was to obtain comments from the private sector on how best to proceed. Thompson 731, 733. Indeed, Mr. Robert Lamb testified that he thought it would be a potential "bonanza" for outside accounting and financial firms:

Q. Do you know what outside information was being looked at as part of that process?

A. I sent our deputy chief financial officer, Sky Lesher, who heads the Office of Financial Management, I sent to some of the meetings that were occurring because I wanted to be sure that he could weigh in and say in a way that the Federal Register notice would be crafted that it might invite outside organizations that he would be familiar with to send in comments. This was a, I thought, potential bonanza for accounting firms and management firms and so forth, if they saw that we were embarking on what was going to be a very large project.

Lamb 2718-2719.

8. Although Mr. Thompson testified that he believed that the process was not a worthwhile exercise, Thompson 71-72, Mr. Lamb reported that often when an agency initiates a Federal Register process seeking comments, it has a good understanding for what the commenters will say before the notice is published but they use the process in an effort to generate new information:

A. As I've testified before, you'll have to talk to someone who really knows APA. I would say this, my exposure and interest in these

matters is somewhat limited. I took a rotational assignment when I was just joining the Department before going to the Office of the Secretary in the Minerals Management Service. What I learned about the Federal Register process there was that -- and the reason I took the assignment was I wasn't exposed that much to it. That's the only time. What I learned there was that often things are put in the Federal Register. I could ask the people I was working with, the Sun Oil & Gas leasing in the Gulf. They knew quite well what the industry and environmental community would say, even before putting the regulation out. They work every day with these constituencies. They understand what the position of people is. But it is an effort to bring in additional information and any new pertinent information. And the fact those individuals have a long term history in these areas doesn't in any way deride the fact that they use the Federal Register process.

Lamb 2912-2913.

9. At about this same time, on March 27, 2000, the Department filed the first of three summary judgment motions that argued various aspects of the 1994 Reform Act. Shortly after the motion was filed, on April 3, 2000, the Federal Register notice was published initiating the process for acquiring comments on the prospective shape of the historical accounting. The notice scheduled public meetings for gathering comments from those interested over the course of April and May 2000. 65 Fed. Reg. 17521-17523. Mr. Thompson stated that those meetings, in fact, occurred. Thompson 1850-51.

10. On May 12, 2000, Defendants filed their second motion for summary judgment. In it Defendants argued that under the 1994 Reform Act they had no obligation to provide an accounting for funds neither deposited nor invested pursuant to the Act of June 24, 1938, 25 U.S.C. §162a.

11. At the same time the Department also began to address the expenses arising from this Court's December 1999 decision. Mr. Lamb requested reprogramming authority

to meet the agency's immediate need for funds. See Lamb 2724, 2728. He also began work on a budget amendment through the Office of Management and Budget, seeking approximately $30 million. Lamb. 2729. Ultimately, OMB agreed to a figure of approximately $29 million, of which $10 million was identified for the historical accounting project. Lamb 2730-31. (See footnote 2)

12. As this process extended, Mr. Lamb became concerned that to achieve the budget amendment, it would be necessary to identify what office within DOI would be in charge of the historical accounting project. Lamb 2733. To resolve that question, he and others met with the Secretary's Chief of Staff, Anne Shields. Lamb 2734-2735. To accommodate Special Trustee Thomas Slonaker's schedule, the meeting was set for August 2, 2000. Id.

13. The meeting took place on August 2, 2000. Lamb 2742. The first topic turned, not to who would take charge of the historical accounting project as Mr. Lamb had expected, but to what form of accounting should be pursued. Lamb 2743-2744. The decision on that question was to employ a statistical sampling form of accounting for the project. Id. As to the “who” question, the Chief of Staff determined that the Office of the Special Trustee was the logical office to undertake the sampling project. Lamb 2753-2755. Along with those decisions Assistant Secretary for Indian Affairs Kevin Gover was assigned to address the Federal Register comments that had been received, and Mr. Slonaker was assigned to draft a memorandum supporting the statistical sampling project.

See id. Indeed, as Mr. Lamb recalled, Mr. Slonaker asked to write the memorandum on the historical sampling project: “In fact, I think he asked if he could do the memo, actually, in his case. I think he said, 'I would like to write something up.'” Lamb 2755. Mr. Lamb offered comments on the draft, and Mr.

Slonaker finished his memorandum in about ten days. Lamb 2756-2757. And that became the memorandum that was sent to Secretary Bruce Babbitt in December 2000. Lamb 2757.

14. The witnesses who testified about the statistical sampling project and the August 2, 2000, meeting unanimously agreed that there had been no earlier decision to use statistical sampling. Mr. Thompson testified that the decision was made in August 2000 Thompson 74-75, and at the initiation of the Federal Register process there had been no prior determination. Thompson 78. He later explained that statistical sampling was not a predetermined result:

I don't have any evidence that there was a predetermined result or outcome. I obviously didn't think there was going forward to the summer because I did work after this to hire the experts to help us do historical accounting that they reference on this. I did some preliminary work with the procurement folks to bring people in or at least to contract with people to assist us in determining what we needed to do for a historical accounting.

Thompson 261-262. And Mr. Thompson disagreed with the Court Monitor's conclusion that a decision to employ statistical sampling had been made before the August 2, 2000 meeting. Thompson 374-375. Mr. Thompson's recollection is consistent with Mr. Lamb's that the decision was not made until the August 2, 2000, meeting. Lamb 2933. Plaintiffs offered no testimony that the decision had been made before the August 2, 2000, meeting.

15. With the “who” resolved, Mr. Lamb's efforts on the budget amendment moved forward. Lamb 2760. The amendment was adopted, and the $10 million for the historical accounting was approved. Id. At about this same time the Department, on September 19, 2000, filed its third motion for summary judgment. (See footnote 3)

16. During the fall of 2000, Mr. Slonaker focused on settlement talks, Lamb Tr. 2759- 2760, and it was not until December 2000 that his memorandum on recommending a plan for statistical sampling was finalized. Mr. Slonaker's and Assistant Secretary Gover's memoranda were sent to Secretary Babbitt for a decision on how to proceed with a historical accounting project. Lamb Tr. 2762; see Plaintiffs' Exhibit 25 (Memo from Mr. Slonaker to Secretary Babbitt dated Dec. 20, 2000). Based on the two memoranda, Secretary Babbitt adopted statistical sampling as the basis for the historical accounting. Lamb Tr. 2762. That decision was filed with this Court and the Court of Appeals in January 2001. Plaintiffs' Exhibits 23, 24.

---

17. Defendants are mindful of this Court's concerns expressed at closing argument regarding the project on collection of information from third parties. Although not expressed as well as it could have been, the first three Quarterly Reports make mention, albeit obliquely, to limiting that project to the period 1994 forward. In the portion of the first Quarterly Report entitled “Report on Collecting Information From Outside Sources,” filed March 1, 2000, there are several references to the limits. Plaintiffs' Exhibit 7. The Report states:

Time Period Covered. Although the Order did not define the period to be covered by the directed accounting, the question of the scope and nature of [the] Department's responsibility to render and accounting prior to October 25, 1994 . . .is under appeal. Therefore, this document details the proposed strategies for collecting missing information to meet Interior's statutory obligation.

Id. at 2. See also p. 4 (same); p. 9 (same). Also on page 9 the Report states:

. . . While this can be addressed generically, that could involve significant amounts of information in the hands of 3rd parties that is already adequately maintained by government agencies, including OST for

periods after October 1994. (emphasis added).

And at page 11 the Report states: “Analyses are underway for all transaction data from late 1994 forward.”

18. There is a fleeting reference to the limit in the second Quarterly Report filed May 31, 2000, in the terse portion concerning collecting information from third parties. Plaintiff's Exhibit 8 at 24: “An electronic file documenting debits and credits for IIM accounts from October 1994 to present has been prepared and is currently being analyzed by a contractor.” Finally, there is a further reference to the limitation in the third Quarterly Report, filed August 31, 2000. Plaintiffs' Exhibit 9 at 36: “Therefore, this effort focuses on

the proposed strategies for collecting missing information, data and documents to meet Interior's statutory obligation for the period following October 25, 1994.”

19. Taken together these statements provide information to the Court that the information collection looks forward from October 1994. It is true that a more explicit statement could have been made, and it should have been made. Nevertheless, measured against the absence of evidence proffered by Plaintiffs to show that the language employed was part of a scheme designed to mislead this Court, it does not amount to contempt.

20. The record reflects that this Court was apprised of the true actions of Defendants throughout the period from March 2000 through January 2001 regarding the historical accounting project. The Federal Register notice process was commenced April 3, 2000, after a filing (which attached the draft notice) seeking this Court's approval to meet with Plaintiffs. The meetings scheduled in the Federal Register notice were held. In early August, the decision to pursue statistical sampling as a form of accounting for the historical accounting project was reached, and when the decision was formalized by the Secretary in December 2000, this Court was notified in January 2001. During that period, Defendants filed motions for summary judgment in March, May, and September that presented arguments regarding the shape of the historical accounting project. These were the Department's “true actions” during the period, and they were made known to this Court. Consequently, the second specification of the order to show cause should be discharged.

B. The Historical Accounting Project Has Been Initiated.

21. With the succession of the new administration in January 2001, Secretary Gale A. Norton took office at the end of January, 2001. Norton 4279. After the Court of Appeals

affirmed this Court, she took her first action regarding the historical accounting project; she endorsed Secretary Babbitt's and Mr. Slonaker's statistical sampling approach in a memorandum in February 2001. Norton 4386, 4387. She made that decision to make clear that the project, unlike others that were on hold early in the Administration, should get moving, to “kick people into gear.” Norton 4387.

22. In January 2001 the historical accounting project was getting underway, according to Mr. Thompson, with the search for a project manager for the statistical accounting project. Thompson 703. With Mr. Lamb's help, Jeff Zippin was identified and hired as project manager. Lamb 2769; see also Thompson 360. Mr. Zippin with the assistance of the Office of the Special Trustee pushed the statistical sampling project forward with meetings and briefings. Thompson 360.

23. The nature of the historical accounting project changed dramatically in July of 2001 when, by Secretarial order, Secretary Norton created the Office of Historical Trust Accounting and set timetables for the project. Norton 4389, Thompson 361; see Secretarial Order 3231; Plaintiffs' Exhibit 28 (Blueprint

for the Comprehensive Historical Accounting Plan) at 7. The Secretarial Order directed that work that would contribute to the project should be done in advance of completion of the final plan. Plaintiffs' Exhibit 28 at 7.

24. Again with Mr. Lamb's assistance, Interior recruited a top flight manager, Bert Edwards, to head the Office of Historical Trust Accounting (competing with one of Bill Gates' foundations to acquire exceptional talent). Lamb 2770-2771. As Mr. Thompson described their activity, OHTA by December 2001 had recruited staff, detailed additional staff from other parts of DOI, and acquired information all in getting the historical

accounting project underway. Thompson 362, 363; see Thompson 42. And Mr. Thompson agreed that OHTA was moving forward with the historical accounting project. Thompson 1962.

25. Significantly, the project has taken concrete steps on aspects of the historical accounting that will be a part of the final accounting. For example, a pilot on the judgment fund and per capita accounts has been completed using a CPA firm to work those accounts. Thompson 1861. As Mr. Thompson testified, the accounting work on those accounts would form a part of the historical accounting effort; in his words "that's why we did it." Thompson 1862. Indeed, the Office of Historical Trust Accounting in its November 2001 report emphasized the point that the work already done on the pilot project on the per capita and judgment fund accounts would contribute to the historical accounting project. Plaintiffs' Exhibit 31, "Report Identifying Preliminary Work for the Historical Accounting" at 6, 14-15.

26. As Interior's Status Report to the Court Number Eight ("Eighth Report"), Plaintiffs' Exhibit 66, further explains, a certified public accounting firm has completed a pilot project in which it examined accounts and transactions affected by the ten largest tribal judgment awards. Id. at 23-24. This work has resulted in the reconciliation of approximately 8,000 IIM accounts with an aggregate balance of approximately $30 million, which represents nearly 8% of the entire IIM trust fund balance. See id. Analysis of the five largest per capita distributions (See footnote 4) has resulted in the reconciliation of approximately

23,000 transactions totaling approximately $50 million which will contribute to the reconciliation of approximately 17,000 IIM accounts. See id. at 24.

27. Other work has been accomplished that will inform the historical accounting project. The Secretary testified extensively, within the bounds of the protective order, (See footnote 5) about the work done by Ernst & Young on the five named Plaintiffs. E.g., Norton 4298- 4330. The Secretary reported that Ernst &Young had the information they needed to complete their work on the five named Plaintiffs. Norton 4307. She stated that Ernst & Young reviewed approximately 500,000 documents in reaching their conclusions on the five named Plaintiffs. Norton Tr. 4309.

28. The trial record establishes that the historical accounting project has been initiated. The organization to perform the project has been created, staffed, organized, and funded. Initial plans to complete the project have been crafted. These actions alone would constitute "initiat[ing]" the project sufficiently to overcome the show cause order as a matter of fact. But, more importantly, the record reveals that at least two specific pieces that support the historical accounting project have either been completed or are underway. The five named Plaintiffs' accounts have been analyzed by Ernst & Young. Additionally, a project on the per capita and judgment fund accounts, which Mr. Thompson characterized as necessary for the historical accounting, have been started with completion of pilot projects. Consequently, regardless of how it is analyzed, Defendants have

"initiate[d] a historical accounting project, " and the order to show cause with respect to the first

specification should be discharged.

III. TAAMS and BIA Data Cleanup

__29. There is considerable overlap between testimony and other evidence relating to the third specification (which addresses the status of TAAMS in the summer and fall of 1999) and the fourth specification (which addresses the status of TAAMS and BIA Data Cleanup during the quarterly reporting periods). Because the evidence relating to TAAMS developments is relevant to both specifications, the facts relevant to both specifications will be addressed together in this portion of the "Findings of Fact." The "Conclusions of Law" section below will address the third and fourth specifications separately.

__30. The evidence presented at trial, which is summarized below, is notable for the lack of a suggestion by any witnesses that there was an intention to mislead the Court about either TAAMS or Data Cleanup. For instance, because the uncontradicted testamonial evidence presented at trial was that DOI in fact decide to disclose TAAMS delays to the Court in the Fall of 1999, there plainly has been no intent to defraud the Court; for that reason alone the third specification should be discharged. And although problems with the two projects themselves were ultimately presented to the Court in a less comprehensive fashion than the Court may have expected, those problems were in fact presented. Of particular note, the revised HLIP contained a detailed description of the problems that had been encountered in both projects since Trial One, a sufficiently negative description that it prompted sharp commentary from the Court during hearings over the planned move of OIRM to Reston. In light of the full record, there plainly has been nothing

close to a fraud on the court in connection with disclosures on TAAMS or BIA Data Cleanup since March 2000, and therefore the fourth specification should also be discharged.

A. TAAMS

____1. Summer 1999

31. DOI has acknowledged that delays in the TAAMS rollout schedule between Trial One and the Court's December 1999 ruling should have been disclosed to the Court. Indeed, as discussed in detail below, DOI itself made the decision at the time that the Court should be told about those developments, and prepared multiple drafts of a report to the Court on the subject. Where the unanimous view of decision makers at the time was that the Court should be informed of those delays, and where there has been no evidence of any decision or motivation to hide that information from the Court, there is no credible evidence _ much less clear and convincing evidence _ that the failure to do so was attributable to any form of fraud on the Court.

32. Some background on the nature of the testimony about TAAMS at Trial One is necessary in order to understand the full context of the delays in the second half of 1999. The schedule for deployment of TAAMS at the time of Trial One was for a 100-day pilot project to be carried out in Billings, Montana in the summer of 1999, during which both TAAMS and the legacy computer systems (LRIS and IRMS) would run in parallel. Nessi Trial One Testimony, at 2280. If the results of the pilot were acceptable, TAAMS could then be rolled out in other parts of the country until TAAMS was in place nationwide by June 2000. Id. This pilot would run on "live data," so it was important not only that the computer hardware and software be ready for use, but that supporting data be sufficiently

converted from the legacy system to make the system capable of performing adequately. Id., at 2352.

33. At the time of Trial One, the TAAMS system had only recently been unveiled in Billings, Montana, and the initial demonstration of it had been successful using data from sample transactions, i.e., not actual trust records. Id., at 2366-67. Although data conversion had not been completed at the time of Trial One, Mr. Nessi had been assured at the time that the errors could be fixed promptly. Pl. Ex. 2 at 33

("They could not get the data converted into TAAMS from IRMS as quickly or efficiently as they would have liked. But ATS assured him that the system would be ready for the July 1999 user acceptance test").

34. During this contempt trial, Mr. Nessi was questioned about his testimony regarding TAAMS at Trial One. Mr. Nessi's recent testimony reveals that he testified in good faith concerning the status of the TAAMS system and the broader TAAMS initiative as of the date of his June 1999 appearance before this Court.

The users had been meeting regularly with the vendor. The feedback that I was getting from them was they liked what they were seeing. I had a short demonstration of the software. It worked fast. It looked very good, from my perspective, and I was positive. I felt very good, at least about the software aspects of TAAMS.

Nessi 3286. At the time, Mr. Nessi believed that the rollout schedule was realistic and BIA could meet the aggressive TAAMS schedule. Nessi 3288. Data conversion was moving forward and progress reports were positive. Id. ("Reports that I had been getting from Billings was that they were moving along very well, that they had good inroads into cleaning up the inconsistencies between the two LRIS and IRMS databases; that they had

set up a good process for cleaning up many of those issues on a very quick basis."). There was no indication that significant data conversion problems would impede the development and functionality of the TAAMS system. Id.

35. It is also important to bear in mind that DOI presented extensive testimony at Trial One that the Billings pilot project was designed to test whether the functionality of the basic TAAMS system was able to meet the varied needs of the Department. Gover Trial One Testimony, at 1119, 1156-58; Thompson Trial One Testimony, at 3027-3029; Babbitt Trial One Testimony, at 3709-10. As the testimony reflected, inherent in such systems testing is the possibility that the results will demonstrate the need for further changes in the proposed system. Former Assistant Secretary Gover testified as follows:

THE WITNESS: Even after it is deployed - - in Billings, for example we're going to learn more about the system - -

THE COURT: Right

THE WITNESS: - - and know what more things we would like for it to be able to do, and the software will again be modified.

Gover Trial One Testimony, at 1119. Mr. Gover also acknowledged that this process would require repeated testing of the system until it was shown that it had all functionality required to meet the BIA's needs, and expressed his commitment to making sure that goal was attained. "In any software development, there are going to be some bugs," but "we will continue to debug and otherwise modify the software until it can do what we want it to do." Gover Trial One Testimony, at 1156-58; see also Thompson Trial One Testimony, at 3027-3029. DOI specifically explained this concern in its Trial Memorandum:

It is important to note that the HLIP is a planning document that will

be amended and evolve as needed. The document itself states that each of the "Sub projects may be modified during the process of their implementation to reflect change and/or unanticipated circumstances, including, for example, the availability of funding and personnel."

Defendants' Trial Memorandum (June 9, 1999) at 16; see also Babbitt Trial One Testimony, at 3969 (HLIP "is, by consent of all, a truly dynamic document ... it should be under revision all the time").

36. Of particular note to this contempt trial, former Assistant Secretary Gover acknowledged that he knew there were risks with moving quickly but that it was important to him that TAAMS got underway during his administration. Gover Trial One Testimony, at 1117. Then-Acting Special Trustee Tom Thompson similarly testified that it is common and appropriate, in a complex management environment, to continually revise and change plans. Thompson Trial One Testimony, at 2981-82. As Mr. Thompson testified, "[y]ou can pretty much say that once a plan is published, it's outdated, and so you need to start working on the next one." Id.

37. The testimony presented at Trial One also noted the significant possibility that there would be delays in the TAAMS rollout schedule. Mr. Nessi, for example, testified that the milestones were aggressive, and that there was no guarantee that it would be possible to meet them. Nessi Trial One Testimony, at 2280 (deployment schedule is "tentative until we know that we have a good system that's well tested and ready to move forward"); id., at 2281 (milestones were "aggressive"). David Orr, the Vice President of ATS, testified that there were issues, such as user dissatisfaction with the basic TAAMS system, which if they arose could delay TAAMS deployment. Orr Trial One Testimony, at 2919; see also Defendants' Proposed Findings of Fact for Trial One, at ¶ 229. Mr. Thompson similarly testified that the TAAMS rollout schedule was going to be difficult to realize, largely because of the complexity of the TAAMS system and the compressed planning and implementation schedule:

> Well, the way the thing was rolling out on these system development pieces, the [TAAMS] schedule was highly compressed. There was very little time in my mind to finish the work between the time we published the high level plan and when the final action was due, which was 12 months away. I pointed out that we had taken a couple of years, in the case of OST, to get to that same point, and that assuming and thinking that the work in BIA was going to be more complex, that time frame was going to be tough. Thompson Trial One Testimony, at 2964-65.

38. After Trial One, a number of obstacles began to impede the rollout of the TAAMS system. Most notably, there were issues with data conversion and with requested software changes, so that the system was not at that time ready for actual operation on live data. Pl. Ex. 2, at 40-41. Mr. Nessi explained the nature of the data conversion issues during the summer of 1999, and their impact upon the planned testing of the system:

> A. The data conversion proved to be a far greater challenge than anyone could have imagined, and during the month of July, we actually had the test teams actually showed up, but the test wasn't really conducted because there was just -- every day the conversion team would say tomorrow we'll have it done; tomorrow we'll have it done. And that happened throughout July and it never was completed in July.
>
> Q. The data conversion was not completed?
>
> A. The data conversion, right.
>
> Q. How did that impact the ability to carry out the testing?

> A. We were relying on an exact replica of the legacy data to test TAAMS, and that just didn't happen.
>
> Q. What was your understanding about the nature of the data conversion problems in July of 1999? Did they seem to you like they were going to be major problems, minor problems? Where did you fit -- they fit, where did they fit, in your mind, at that time?

A. In the beginning they were -- the conversion teams were telling me that that would be -- that they would be able to solve the problems. As the month wore on and I heard more about what the problems were, okay, many of the problems _ this was not a technical issue, this was trying to take data from two databases that for many years should have been working together but didn't.

Nessi 3292-93. Ms. McLeod, the ATS Project Manager for TAAMS, also testified that there were data conversion problems in the summer of 1999. She explained that the data conversion contractor, Anteon, was retained to convert files from the old legacy systems into a format that could be utilized by the TAAMS system, and then ATS would load the data into TAAMS. McLeod 2966.

39. Although at first it was thought that these data conversion problems could be corrected so as not to effect the overall schedule, as the scope of the data conversion problems became known it became apparent that system testing would be impacted. Nessi 3293-3294. The IV&V Report for a July 1999 system test, for example, explained that "[m]ajor problems with data conversion were found." Pl. Ex. 2, Tab 7F, at 17 At a test in Dallas in August 1999, there was "a terrible struggle with data conversions." McLeod 2974. The IV&V Report reflected the magnitude of the data conversion problems:

The first critical problem discovered involved data conversion errors. That process had resulted in some of the data being shifted by 20 characters resulting in multiple data errors and causing difficulty in the test evaluation process.

. . .

The team was briefed on the developer-test DB [database] differences. The development DB had old Billings test data. The test team had been using a newer DB. Due to this, the programmers could not duplicate several problems found by the testers. This indicated that the data conversion was still causing problems, and the testers couldn't tell when they had an application problem or a DB problem.

. . .

It was decided that the project schedule would be extended for several weeks to allow for data conversion and application fixes to be incorporated and tested prior to the next test event.

Pl. Ex. 2, Tab 7F, at 18.

40. At the same time that data conversion delayed progress, it also became apparent that there would be a need for additional changes to the TAAMS software in order to have it reflect the unique BIA business practices. See McLeod 2983-84. On this point, both Ms. McLeod and Mr. Nessi agreed that the following summary of the issues confronting the TAAMS team _ included within the revised HLIP that was filed in March 2000 _ accurately summarized the nature of the problems they faced at that time:

One of the most important observations made after the first prototype of the TAAMS system was released in mid-summer 1999 was that the initial design meetings did not fully capture the entire scope of the BIA's needed functionality. Furthermore, it became apparent that the lack of consistent business rules and processes across the BIA (many resulting from statutes and probate laws that vary from state to state) placed the software vendor in a very difficult position as it attempted to modify the software to meet the BIA's needs. Although it was always assumed that additional adjustments would be necessary after the first prototype, it was initially believed that a large part of the basic functionality was present during the late June 1999 release of TAAMS. However, this was not the case and it became apparent during the system test conducted with BIA users during July and August 1999 that a significant level of analysis and system

modification remained in order to ensure that all of the BIA's unique business functions were addressed.

Pl. Ex. 6 at 69; Nessi 3296-97; McLeod 2997-98.

__41. Also in the summer of 1999, BIA began consideration of a change to its schedule to deploy the title module prior to the leasing module. See Pl. Ex. 2, Tab 3D. Mr. Nessi explained that the direct catalyst for consideration of this change was the fact that the data conversion contractor was having significant difficulty combining data from the two legacy systems. Nessi 3295. Rather than having the entire system deployment await the completion of both modules, it was Mr. Nessi's view that it would be a better approach to focus on the title module first, then move on to the leasing module. Id. Ms. McLeod, the ATS Project Manager, shared Mr. Nessi's view that the decision to deploy the title module first was "a good business decision." McLeod 3054. On September 21, 1999, the Configuration Management Board (which was made up of Mr. Nessi, Mr. Snyder, George Gover, Nancy Jemison and Terry Virden), made a final decision to recommend this change to the TMIP committee, according to an e-mail from Mr. Nessi summarizing the decision. See Pl. Ex. 2, Tab 5G. Both Mr. Nessi and Ms. McLeod testified at trial that these considerations set forth in that memorandum in fact supported the decision to deploy the title module first. See Nessi 3299; McLeod 3055-57.

42. It is also important to note that, though DOI has recently decided to hold off on deployment of the realty module because of system development problems, the 1999 decision to deploy title first was expected ultimately to have no impact upon the final TAAMS system in place for BIA. See McLeod 3059. In other words, the decision to deploy

title first was at that time viewed as a change to the rollout process, rather than a change to the end product that would be delivered to BIA.

43. Contrary to Plaintiffs' suggestion that the decision to deploy the title module first was somehow designed falsely to demonstrate progress in the system development effort, this decision was based purely on a desire to move forward with implementing TAAMS in an efficient and effective manner. Nessi, 3299-3300; Snyder 2622-23. The decision to separate the title and realty functions of the TAAMS system is consistent with generally accepted IT development procedures and system development procedures, as "it is considered a best practice to implement a system in smaller, more manageable modules, and to -- you learn a lot about the system, you learn a lot about the environment when you do that." Nessi 3300. Ms. McLeod, who testified that she participated in discussions about this decision before it was made, McLeod 3054, stated that, to the best of her knowledge, there was no improper motive in the decision:

Q. What kind of contact did you have with Mr. Nessi and other BIA people? Did you have fairly regular contact throughout the development process?

A. Yes, we did.

Q. Did anybody ever -- let me focus it first on Mr. Nessi and then I will ask about other people. Did Mr. Nessi ever suggest to you that this decision to deploy title first and then realty later, leasing later, was in any way driven by any desire to show progress to the Court when, in fact, there had not been progress on the TAAMS project?

A. No.

Q. Did Mr. Nessi ever provide you with any type of -- did he ever say anything to you or suggest anything to you that made you believe that he had any improper motive in reaching this decision?

A. No.

Q. Did anybody at BIA say anything that suggested to you that they had any motive in doing this other than the best interest of the system?

A. No.

McLeod 3060.

44. The understanding that this decision was made in the best interests of the overall system development effort was also consistent with Mr. Snyder's recollection. He explained that, in his view, this approach made sense simply because the title module was further along in development. Snyder 2622-23. He stated, “if you're trying to make _ bring up parts of the system that are usable and something else is going to delay that, and you're trying to get more use out of a system, you know, some piece early, then _ and you could do it without impacting the other, then it makes sense to do ... I didn't think it was unusual.” Id.

45. In sum, numerous DOI witnesses made clear at Trial One that the planned development and rollout schedule was an aggressive one, that might be delayed in the event of likely problems. In fact, such difficulties _ principally with the data conversion process and with a need for additional modifications to the software functionality _ did occur. And it was in light of these difficulties that DOI decided to deploy the title module, which was in better shape and did not have the same data problems, prior to the realty module.

____2. September 1999 Draft Submission to the Court

46. On September 8, 1999, a meeting chaired by DOI Chief of Staff Anne Shields was held to address the status of TAAMS. Other attendees included Kevin Gover, John Berry, Robert Lamb, Thomas Thompson and Daryl White. Pl. Ex. 2, Tab 7E.

47. Among the topics discussed at this meeting was delays that had occurred with respect to the TAAMS system since Trial One, discussed above. Id. There was agreement among all of the participants in this meeting that the delays from the schedule proposed at Trial One should be disclosed to the Court. Mr. Thompson, for example, testified:

A: My take on the meeting, as I recall it, was that the decision was made to inform the Court of this situation. I don't know that we had an actual final draft of the actual information to be provided the Court, but it was clear to me that steps were going to be taken to inform the Court of these issues, and the chief of staff concurred with that.

. . .

Q. Do you recall whether or not anyone suggested that disclosures not be made because of the concern as to how the mediation would be affected?

A. I don't recall any conversations to that effect.

Q. I'd like to point you to the category called Outside --

THE COURT: In fact, I take it from the way you've characterized the meeting, there was no one speaking out about not informing the Court.

THE WITNESS: On the contrary, Your Honor. My sense, and I guess my shock expressed earlier, was that you didn't receive that information. There was nobody who was, that I recall, who suggested or thought that the information should not be provided to you.

Thompson 1171-72; see also Thompson 157-58; Thompson 1126-27.

---

48. Daryl White, the only other participant in that September 8, 1999 meeting who testified about it at trial, also stated that there was a unanimous decision made to disclose these delays to the Court. See White 2550 (“Q. Do you recall if there was anyone at that meeting who did not agree with the idea of submitting a report to the Court? Did everyone agree? A. I don't remember any disagreements.”); see also Pl. Ex. 2, Tab 4H (Sept. 9, 1999 e-mail from Anne Shields to Ed Cohen) (“while the consensus at the meeting was that no one had testified to an exact schedule [at Trial One] so we probably don't have to correct anything, everyone thinks that the court has the schedule in some of the documents and since we will be giving the Hill clarification, we should give it to the court as well”).

49. Following the September 8, 1999 meeting, drafts of a brief report to the Court on these issues were

circulated among DOI employees for review and comment, but the report ultimately was not filed with the Court. See Pl. Ex. 2, Tabs 4G, 5B, 5C, 5D, 5E and 5F. No witnesses who testified at trial offered any explanation _ other than the possibility of a "bureaucratic bungle" _ as to why this report was not filed with the Court. See Thompson 1172 ("THE COURT: We don't know whether it was the Solicitor or the Secretary that decided I wouldn't be told. You don't know? THE WITNESS: I do not know or whether it was just a bureaucratic bungle."); White 2528 ("Q. And do you know why that notification ultimately _ that the Court did not ultimately get notified prior to the Senate testimony of Mr. Babbitt? A. No, I do not know."); Snyder 2618 ("Q. Did you ever have any -- did anybody ever suggest to you that it shouldn't be filed, should not be filed? A. Not that I'm aware of."); Nessi 3311 ("Q. Did you ever hear anybody at that time make

any statements that information should not be disclosed to the Court? A. No."). The Court Monitor also notes the lack of evidence whether any such report was ever provided to Department of Justice attorneys. See Pl. Ex. 2, at 57 n.10.

50. The Second Report of the Court Monitor offers no evidence of any affirmative decision not to submit this report to the Court. See Pl. Ex. 2, at 48-58. Although the Court Monitor infers that "[a]pparently the decision was made that because no one had testified to an 'exact' schedule the Court would not need to be fully apprised of the changes" to the schedule, see Pl. Ex. 2, at 51, he cites no evidence in support of that inference other than the Anne Shields e-mail quoted above, and no other evidence supporting that view was presented at trial. As noted above, the only testimony presented at trial on the issue was that there was an affirmative decision made to disclose the information to the Court.

51. At a Court hearing on April 4, 2000 _ after the submission of the Revised and Updated High Level Implementation Plan ("HLIP 2000") on March 1, 2000 _ the Court expressed significant concern about changes to the plan and schedule for TAAMS that had occurred since Trial One and had been disclosed in HLIP 2000. See generally Transcript of April 4, 2000 Hearing. In the weeks thereafter, DOI and DOJ officials drafted a proposed filing with the Court that would address some of those concerns. See generally Pl. Ex. 63. Included within the final drafts of that filing (which ultimately was not submitted to the Court) is the following language: "Since the record for the Phase 1 trial had closed, and this Court, in response to Plaintiff's oral request to open the record, told the parties that it would not reopen the record, the next opportunity to provide this information to the Court was not until the Revised and Updated HLIP was filed on March 1, 2000." Pl. Ex. 63, at

DEF0040882 (June 1, 2000 draft). Earlier versions of the draft filing contained similar language. See, e.g., Pl. Ex. 63, at DEF 0040764 (May 2, 2000 draft).

52. There has been no testimony or other evidence presented at trial indicating that a statement from the Court that it would not reopen the record was actually the basis, or even a consideration for not providing information to the Court about delays in the TAAMS schedule. In fact, one set of comments on the draft filing from DOJ attorney Charles Findlay suggested that this language should be removed from the document on the grounds that it is "better to say nothing than give [a] weak reason for not informing [the] Court. Lamberth has made clear repeatedly that he wants full disclosure." Pl. Ex. 63, at DEF0040748. Indeed, the evidence shows that DOI's intention was to provide full disclosure. But regardless, even if there were evidence that this was in fact a consideration for any DOI decision makers at the time, it in no way suggests any form of intent to defraud or mislead the Court.

____3. Fall 1999 TAAMS System Testing

53. Another of Plaintiffs' arguments at the contempt trial _ particularly relevant to the fourth

specification _ has been that DOI did not accurately describe the results of system testing that took place in the fall of 1999. In particular, Plaintiffs have pointed to the statement in the First Quarterly Report that "[s]ystem testing for the pilot site was successfully conducted during September and November 1999," see Pl. Ex. 7, at 14, which they deem to be inaccurate. As described in detail at trial through the testimony of Ms. McLeod, Mr. Nessi and Mr. Snyder, however, the results of these two system tests were, overall, quite positive. Particularly in light of the fulsome description of the status of

TAAMS in the revised HLIP, DOI's disclosures on this issue plainly do not constitute fraud on the court.

54. The first formal system testing of TAAMS, which was monitored by the IV&V contractor, took place in Dallas in late September 1999. See Pl. Ex. 2, Tab 7F, at 15.

55. As with other system and user acceptance testing, the data used for this testing was a copy of the actual live Rocky Mountain Region data, and the testing was conducted in a separate controlled environment so that no errors in the testing process could have an adverse effect upon the permanent trust records. Pl. Ex. 2, Tab 7F, at 15 ("The software DB [database] test version was a replicate of the Billings pilot DB [database], separated from the operational DB so as not to affect that DB." Ms. McLeod explained this point further:

Q. Now during these tests and the later tests that were going on, September, November, and all the later tests that have taken place with the system, were you all using -- let me ask it this way. What type of data were you using to run these tests? Were you using fake data, were you using actual data? What kind of data were you using?

A. We were using data from production, which means we would take data from [LRIS], run it through a conversion, load it into TAAMS, and so it was a copy of the data. It was the real data. But it was on our test environment, so we never loaded the data back up to the legacy. It was just a copy of the data on our system.

Q. What do you mean when you say it was a test environment?

A. If -- it depends on stages. If we're -- when we're talking '99, before TAAMS would go into the system of record, we had an environment set up that wouldn't be considered production, so that means that the data was just a test environment that could be changed that wouldn't affect the production itself.

Q. You say it wouldn't affect the production itself. Are you saying that it wouldn't affect the production data?

A. That's correct.

Q. Okay. So then if there was some kind of problem that came up during the testing, could there be an effect on the actual underlying data?

A. No. Never.

Q. Okay. Are you aware if there's ever been any type of problem with -- during the testing of TAAMS where actual live permanent data has been corrupted?

A. No, that would never happen because it's a test environment. It can't happen.

McLeod 2981-82; see also Thompson 1398 (correcting prior testimony about possible corruption of data in 2001 TAAMS testing and clarifying that "if there was any [data] corruption, it would have been entirely within a test data system, not live data").

56. The evidence presented at trial showed that the primary problems associated with this September 1999 system test related to the testing process and procedures, as opposed to the functionality of the TAAMS system software itself. Mr. Snyder, for instance, testified that his primary purpose in attending this test was to ensure that the test procedures were smooth and efficient, and that in his view, they were not. Snyder 2627. A memorandum he prepared for DOI Chief Information Officer Daryl White

summarized these problems. See Pl. Ex. 2, Tab 5I. He noted, for example, that: test scripts were incomplete at the time the test commenced; key plan documents such as the Configuration Management Plan and Quality Assurance Plan were not available for observers until well into the test; ATS did not "present an organized approach" to the test; and there was not always a direct match between test scripts and contractual requirements. Id., at 1-2; see

also Snyder 2629 (summary included at Tab 5I to Pl. Ex. 2 "pretty well sums it up, because it _ basically my concern was they were just not really prepared for the test"). Mr. Snyder explained that, although his purpose in attending the test was not specifically to evaluate how the TAAMS software itself had performed, it appeared to him that the software did not have major problems. Snyder 2632. Nevertheless, he concluded that the significant difficulties with testing processes and procedures made it impossible to verify that the software had performed adequately, and he therefore recommended that another system test be conducted. Snyder 2631.

57. Ms. McLeod provided further testimony on this September 1999 system testing, and generally agreed with Mr. Snyder's criticisms of the testing process, as opposed to the performance of the TAAMS software itself. McLeod 3005. She explained, for example, that Mr. Nessi had asked that an independent contractor be asked to write the scripts for this test, in order to provide an "unbiased" assessment of how the software was performing. See McLeod 3002 ("he wanted to make sure that no one would come back and say the developers wrote the scripts to fit the software"). Although this contractor was supposed to have the scripts prepared two weeks before the test so that ATS could be prepared to run them properly, they were not actually provided until very shortly before the test began. See McLeod 3003 ("That always makes it difficult because you don't know if the scripts are correct or not. So that would be a challenge for us. We weren't pleased with that, that we didn't see them before the test started."). Ms. McLeod also testified that the unexpected presence of GAO personnel monitoring the test added to the logistical difficulties of it. McLeod 3006. Both Ms. McLeod and the IV&V Report also noted that there were

remaining data conversion issues that hampered the testing process. See Pl. Ex. 2, Tab 7F, at 19 ("There were still some problems that the data conversion team needed to resolve"). McLeod 3007 ("Q. Were there still data conversion problems that were apparent during the September test? A. Yes.... Q. And did the data conversion problems have an impact on the way that the test actually runs? A. Yes. Q. In what way? A. Well, we're trying to run the data on the legacy systems through the software itself, so if there was issues with the data, then it could affect the software.").

58. Ms. McLeod and the IV&V Report were more positive, however, about the performance of the TAAMS software itself at the September system testing. For instance, the IV&V Report noted that "[t]he system's stability had improved from the last testing observed." Pl. Ex. 2, Tab 7F, at 19. There were approximately 10 "problem reports" written during the test, some of which the IV&V contractor believed needed to be addressed. It concluded that "[t]he testing could be considered as successful. Most of the requirements the IV&V team had previously identified as critical were tested. This did not include the critical requirements included in separate testing refered to as technical and special tests." Id., at 20. McLeod agreed:

Q. ... in light of those comments [contained in the IV&V Report] and your own knowledge about how the testing actually went, having been there, can you summarize generally your view as to the results, how successful this September test had been?

A. The September test was very successful as far as the software was concerned. I mean we identified more of the data conversion issues, and we had to help clean up the test scripts. So that was

awkward, but it was a good test for the software. We felt the software looked well -- looked good.

McLeod 3008-09.

59. In large part because of the problems with system testing procedures and protocols during the September 1999 test, another system test was performed on TAAMS in late November 1999. The testimony and evidence presented at the contempt trial concerning this November 1999 system testing demonstrated that the system performed well and that the testing process was effective.

60. Pointing to the portions of the IV&V report listing the scope of the test, see Pl. Ex. 2, Tab 7F, at 49-57, Ms. McLeod first explained that both the title and the leasing functions of TAAMS were evaluated during this system test. She noted that sections 4.1. through 4.2 of the contractual requirements, set forth on pages 49 and 50 of the IV&V Report, relate to TAAMS title functions. McLeod 3023-24. The lengthy list of functions included in sections 4.3 through 4.5, which are set forth on pages 50 through 52 of the Report, are leasing functions. McLeod 3024-25. Virtually all of the title and leasing functions that were designated as “mandatory” _ as opposed to “mandatory deferred” _ items in the ATS contract were actually tested during the November 1999 system test. McLeod 3025 (“Q. So going from page _ the bottom of page 50 over to page 52, does this suggest that the items in here where there are entries in the columns on the right, those were actually tested during the November system test? A. That's correct.”).

61. Summarizing the results of the test from her own recollection and from the IV&V Report, Ms. McLeod then explained, in clear terms, her view that the system test in November 1999 demonstrated that the system was functioning well, and that the data conversion problems that had hindered the September 1999 system test had largely been

resolved:

Q. ... What was your understanding and your impression, having worked with the -- with TAAMS and having attended the test, as to how the system functioned during this November system test?

A. Very good. The system looked good.

Q. Would you have considered this to have been a successful test?

A. Very much.

Q. Can you look at the first full paragraph on the top of page 21 [of the IV&V Report], and you see the sentence there that says: “System generally functioned in accordance with the test scripts.” Do you see that?

A. Yes.

Q. What does that mean?

A. Well, to me that means that it's what they expected.

Q. What do you mean, it's what they expected?

A. That the test scripts passed and that the functionality of the system was there.

Q. So is that a reflection on the scripts, or is that a reflection on how the software performed using those scripts?

A. It would be a reflection on the software, the way it performed, the way I would look at it.

Q. And you indicated that the -- most of the leasing functions that we looked at that were mandatory, not mandatory deferred, were in fact tested during this test as well; correct?

A. That's correct.

Q. So when this says that the system generally functioned in accordance with the test scripts, do you read that to apply to the leasing function as well?

A. Yes, of course.

Q. If you look down in the middle of the page, on page 21, there's a paragraph that says: “There were only a couple of minor data conversion problems noted during the testing. This was a major improvement over the last testing that took place the week of September 27th.” Do you see that?

A. I do.

Q. Is that consistent with your understanding of the nature of the data conversion problems as they existed at that system test?

A. I don't remember what the minor problem was, but, yes.

Q. So it is your understanding that there were not significant problems with data conversion?

A. No.

Q. At that test?

A. No, there wasn't. It went very well.

THE COURT: I guess I don't understand one part of that answer. You think this is incorrect where it said of the three requirements not tested, one of the requirements was the system shall record the appropriate direct, in-kind or crop-sharing lease payment made to the owner, which implies to me that that means the system wasn't tested on whether it would make the -- show any payments made, which is really the key to the whole system, isn't it? So you think that was tested?

THE WITNESS: Yes, sir, I do. We tested payment terms. And we tested recording the documents both. So I'm not for sure what that would mean. The payment terms were tested and we actually did a distribution interface to OTFM.

McLeod 3026-29.

62. Part of the foundation for Ms. McLeod's testimony concerning the successful nature of the November 1999 system test was the fact that there were only four, relatively minor, “problem reports” generated during the test. See McLeod 3034; Pl. Ex. 2, Tab 7F, at 23 (IV&V Report explains that “[t]here were only four problem reports open during the test, shown in Appendix B”). Referencing the text of the IV&V Report, Ms. McLeod addressed those four problem reports:

Q. Looking at the fact that there were four problem reports and looking at the actual problem reports -- and if you need a minute to familiarize yourself with those actual problem reports -- can you give me a sense about the significance of the problems that were discovered during this test?

A. (Witness reading document.) Well, the first two are obvious to me that they weren't problems because they were fixed so quickly. The third one, the right-of-way illustrated ODBC driver error. That one I wouldn't know without going back to see how extensive that was, but that would mean that we lost a connection. And then the fourth one seems like it is very minor because it is just truncating the data. In other words, it's not leaving any spaces between the word. So very minor. We were very pleased with the test.

Q. So when you refer to these four problem reports in the context of the entire test, how does that reflect on the entire test, in your mind?

A. That it was very successful.

McLeod 3034-35.

63. Ms. McLeod also explained that the most important aspects of interfaces between TAAMS and the Trust Fund Accounting System (“TFAS”) and the Minerals Management Service (“MMS”) were in fact tested during this November 1999 system test. She explained that the only portion of these interfaces that was not tested was the less complicated physical transfer of data with TFAS and MMS, which normally occurs in the middle of the night and had already been tested numerous times prior to November 1999.

Q. And can you describe again, just so we're clear, what part of these interfaces were not tested in

the November system test and what part in fact was tested, and give me and the Court a sense about the relative importance of what was tested and what wasn't.

A. Okay. The interfaces themselves, we had received a file from MMS from a previous run for Billings. It was decided that we would just take Billings' information from a previous MMS run so we can compare it to what they input to legacy, so we would have the same data that they ran in a legacy run. So we had already received that data from MMS and we did it through an interface. We picked the data up and placed it and ran it through a conversion. But what we didn't do in November was re-pick that information up from MMS because it was already done, so we couldn't go back and do that. So that just picking it up from the server is the only thing that wasn't done. That's a very simple process, picking the information up. So --

Q. But there was a lot else that was done --

A. So the complexity of the software is actually running the MMS through the distribution. All of that was done in November.

Q. And do you consider all of that to be a part of the MMS interface or the TFAS interface?

A. That's all a part of the MMS interface.

Q. And even -- let's talk a little bit even about the smaller portion, which is actually the transfer from MMS to TAAMS. Had that been tested at other times?

A. Yes, it has.

Q. Had it been tested by the time of this November system test?

A. At the time?

Q. Had it been tested prior to that time?

A. Yes.

Q. More than once?

A. Yes.

Q. And it worked?

A. Yes.

McLeod 3269-70; see also McLeod 3215-16 ("An interface, it just means we can receive the file, pick it up and process it. What they didn't see is us pick it up from MMS. That's just a small part of the interface. The interface -- receiving the data, processing the data, is much more complicated than just picking it up off a server. So I guess you could say what wasn't tested was picking it off the MMS server, but the file was processed, it went through a distribution and it was sent to TFAS. And then what didn't happen on the TFAS side is they didn't see the file picked up and processed. But everything ran.").

64. In sum, contrary to Plaintiffs' suggestion that TAAMS "failed" test after test, the evidence presented at trial showed that the results of the Fall 1999 system testing were generally quite positive. Though that testing was delayed somewhat by the data conversion and system development issues, and the September 1999 testing was not as organized and efficient as it should have been, the results left room for optimism that the system development effort was heading in the right direction. Indeed, even Mr. Thompson expressed general agreement at trial with the statement in a November 29, 1999 memorandum to Secretary Babbitt (on which he was a signatory) that "the project is on target and in line with similar complicated systems development efforts." See Pl. Ex. 2, Tab 6J; Thompson 1876-79; see also Thompson 1267 ("I think in the context of the other information and other reports out there, I'm not terribly disturbed by this report to the Secretary about where we were with TAAMS at the end of November"). Later disclosures

about the status of TAAMS in DOI's March 1, 2000 filing must be evaluated in light of these facts.

____4. System Requirements and the RFP

65. Despite the fact that the results of the 1999 system tests showed ultimately that the TAAMS software generally functioned well, one of the major challenges throughout the system development and testing process was the fact that the original RFP (which had been drafted in 1998) did not define the needed TAAMS system functionality in a sufficiently specific way. Several witnesses have testified about the problems that this lack of specificity posed, and the IV&V Report highlights this as a challenge for the TAAMS development and testing process.

66. For instance, Ms. McLeod explained that:

... the difficulty for SRA was that the requirements didn't always fit -- the requirements in the contract didn't always fit the requirements that we received from the customer.

Q. Can you explain that a little bit more, why that would be?

A. The contract unfortunately was written very vague, it's very wide open. So we would have to get further definition of what that requirement would mean from the customer. So since SRA's assignment was only to go against the contract and not the requirements that was actually taken from the customer, it was a huge challenge for them to know if each requirement was met.

McLeod 3011-12. Mr. Nessi made the same point under questioning from Mr. Gingold:

Q. So was it a bad RFP? Was that part of it?

A. I've been critical of the RFP.

Q. So it actually goes back prior to the GAO meeting, doesn't it?

A. Well, the GAO criticized the RFP. In fact, in the GAO's report, I'm pretty sure they criticized the functional requirements portion of that as being too general, which is something that I agree with. Nessi 3455.

67. The IV&V Report also makes repeated reference to the fact that the lack of specificity in the RFP made it difficult to conduct a thorough and complete evaluation of the testing process. Two of the identified “Constraints” on the IV&V process, for example, addressed this issue:

Constraint: Since the original contract envisioned a COTS procurement, the more rigorous development activities associated with Testing, Configuration Management or Quality Assurance standards were not initially levied on the products or processes.

Actual Impact: While there was testing, CM and QA throughout the duration of the project there were no development standards identified in the contract for these areas, project documentation was sometimes not up to par with typical government deliverables for a system of this complexity. This resulted in reviews and comments on documents being subject to individual preferences. The IV&V team applied selected best practices, used in SRA's government business area for systems similar to TAAMS.

Constraint: The requirements lacked sufficient clarity was a major constraint on TAAMS development and test.”

Actual Impact: Because many requirements were inadequate and/or too complex, software development and test script development schedules were difficult to maintain, and many test scripts had an extremely large number of steps or did not completely test all nuances of the requirement.

Pl. Ex. 2, Tab 7F, at 5; see also id., at 7 (“Since the original project was throught to be a simple procurement action the TAAMS project contract was let to a commercial vendor without requirement to meet any specific Software Lifecycle Process standards. This is

critical to the IV&V methodology and approach because documentation and processes usually required in standard development and modified COTS contracts, are neither available nor contracted for delivery in this contract.”)

68. Plaintiffs have highlighted a very brief portion of an e-mail message sent by Jerry Manesis of the IV&V contractor to Mr. White, addressing proposed language for the HLIP 2000, in support of an argument that the TAAMS system was failing even in early 2000. See Pl. Ex. 2, Tabs 8B & 8C. More specifically, in response to language for the HLIP proposed by Mr. White to the effect that the IV&V report "was favorable," Mr. Manesis commented that his "opinion of the overall report is that it was not favorable. I think it was favorable in spots but generally it pointed out a significant number of problem areas that I believe offset the positive things we found." Id. (See footnote 6)

69. Mr. Manesis's comment is not inconsistent with DOI's characterization of the status of TAAMS after the Fall 1999 system tests. First, that very brief comment does not begin to address in any detail the many different aspects of TAAMS testing contained in the IV&V report, which were discussed at length at trial and are summarized herein. Where trial witnesses have explained the testing process and guided the Court line-by-line through the contents of the IV&V report, one individual's summary opinion of the report as "favorable" or "unfavorable" does not truly assist the trier of fact in this case.

70. And second, both the contents of the report and the testimony of these witnesses have shed light on the nature of the IV&V contractor's concerns. As noted above, the

report itself explains that the lack of clear contractual requirements significantly hampered the IV&V process. And Ms. McLeod testified that this lack of clear standards was the fundamental problem that Mr. Manesis expressed to her about the TAAMS development process. See McLeod 3049 ("One of the things that we talked to Jerry about is that I always asked him where he thought we could improve, so we had lots of conversations like that, and his concern to me was the contract itself"). Ms. McLeod made the point even clearer during cross examination by Mr. Harper:

Q. You had some conversations regarding [Mr. Manesis's] concerns from the testing.

A. I did.

Q. But it was not the intent of your testimony, was it, that the only concerns that he had were those from the contract, that the contract requirements were problematic.

A. That's the ones he discussed with me.

Q. Okay. But you have no reason -- is it your testimony that those were his only concerns?

A. The system was a good test. He made comments that he thought it was a good test and it was a good strong system, and the only thing he discussed were requirements, that they should be fixed and repaired.

Q. But when you discussed that, that was the only --

A. To myself.

Q. But what you meant was that the was only thing he discussed with you.

A. That's all he discussed with me.

Q. Okay. But it's not your intent by that statement to mean that

you were ever told that those were his only concerns.

A. Not -- what he shared with me.

Q. But did he -- neither he nor Mr. Nessi ever said that those were his only concerns, Jerry's only concerns, were the contract requirements. You never heard that from Mr. -- from Jerry, did you?

A. Well, we spent lots of hours together testing and that's the concerns that he shared with me, is the contract, and he said, my opinion is, if I was you, I would get that contract fixed, and that's what we tried over and over to do.

Q. So to the best of your knowledge, his only concerns were the contract?

A. Yes.

McLeod 3221-23; see also McLeod 3245-46 (“when I read that e-mail, I was thinking that Jerry was uncomfortable because the contract didn't fit the software and that the contract needed to be rewritten”).

71. Mr. Nessi also raised similar issues in his testimony about a January 2000 e-mail he wrote to Mr. Snyder, after receiving a draft of the IV&V report that was prepared following the November 1999 system test. See Pl. Ex. 2, Tab 7E. He explained that he was frustrated because the IV&V report highlighted the lack of adequately precise contractual requirements. See Nessi 3318-21. “So my concern here was that SRA really didn't have the opportunity to do a good IV&V because we didn't set the stage properly at the very beginning.” Nessi 3320. He also expressed frustration at the IV&V contractor commenting upon the project management effort, when in his view, the accelerated development schedule did not provide him sufficient time and resources to manage the effort. Nessi 3322-23. Mr. Nessi's stated concerns were not with any findings by the IV&V contractor

that the TAAMS software itself was not functioning adequately. See Pl. Ex. 2, Tab 7E.

72. In sum, the concerns raised by Mr. Manesis's e-mail and Mr. Nessi's memorandum must be evaluated in the context in which they were made. The primary concern raised by the IV&V Report (and Mr. Manesis worked for the IV&V contractor) about testing was that system requirements were not well enough defined to permit a clear evaluation of the software status. Ms. McLeod explained that Mr. Manesis raised this concern to her on several occasions, but was generally positive about the software itself. As with the actual results of the Fall 1999 system tests, these considerations must be kept in mind when evaluating the weight to be given to these documents in evaluating the accuracy of disclosures made to the Court.

____5. 2000 User Acceptance Testing and Title Deployment

73. After the November 1999 system test, the next major evaluation of TAAMS was a user acceptance test (“UAT”) that was held in early February 2000. The IV&V Report for that test explains generally the procedure used for the test: “The users entered actual realty transactions into both TAAMS and the legacy systems LRIS and IRMS. The data entry was timed and the results of the transactions processed on TAAMS versus the legacy systems were to be compared for accuracy later.” Pl. Ex. 2, Tab 7F, at 24-25. Although the IV&V report reflects that title and “some Realty capability” were tested, id., at 24, Ms. McLeod testified that virtually all of the realty functions were in fact tested. McLeod 3037-38.

74. The IV&V report reported favorably upon the most important aspects of the system performance during the February 2000 UAT. For instance, it explained that users were generally happy with the system's capabilities:

> After observing the transaction processing on the legacy systems and the long delays in waiting for the results (overnight) then finding out there are mistakes and processing the transaction again only to wait for another overnight batch process were frustrating to say the least. Compared to the TAAMS capability to process transactions in near real time there is little doubt that TAAMS is the far superior system.
>
> It was also clear throughout the test that most users preferred TAAMS, and most were well trained in its use. The younger and middle aged users were very capable and as one would expect some of the older members were somewhat reluctant to change to the newer system.

Pl. Ex 2, Tab 7F, at 25.

75. The report also reflected that, based upon a review of approximately one-third of the transactions of the test, there were no critical errors and only five non-critical errors, a rate that Ms. McLeod characterized as good. McLeod 3044. Ms. McLeod, who attended the test, expressed her view that these were good results and that the February UAT testing “went very well. We were spread out across

Billings doing different tests, but I thought it went very well." McLeod 3044-45.

76. To the extent that there were problems with the system discovered during the February UAT, those problems were generally on less significant issues. For instance, the IV&V report notes that "not all business rules were included in the TAAMS that was being tested," and that although "[t]he business rules individually do not present a critical issue, ... combined they would result in significant amounts of basic data errors being entered into TAAMS inadvertently." Pl. Ex. 2, Tab 7F, at 25. The "business rules" at issue, however, are not the underlying BIA business practices that have been so frequently discussed during the trial. Instead, the term in this context refers to system checks against

inputting data incorrectly, e.g., not permitting the entry of an individual's death date that is earlier than his or her birth date. McLeod 3030-41. Ms. McLeod explained that the other issues raised in the IV&V report regarding the February 2000 UAT were generally not particularly significant. McLeod 3042-44. In light of the importance of the TAAMS system to the trust reform effort, however, DOI decided to conduct another UAT before deciding to deploy the title module to the Rocky Mountain Region, and that final UAT was conducted in April 2000. See Pl. Ex. 2, Tab 9C; see also McLeod 3045-46.

77. There has been no testimony or other evidence calling into question the fact that the results of the April 2000 were sufficient to support the decision to deploy TAAMS to the Rocky Mountain Region for current title purposes, and that is what in fact occurred. See Pl. Ex. 8, at 13 ("A User Test conducted April 21-24, 2000 concluded that the land title functionality of TAAMS was sufficient to initiate deployment to all BIA and tribal land records offices."). Ms. McLeod explained that the characterization of this test contained in the Second Quarterly Report was accurate:

Q. Do you remember what the general approach was for that [April 2000] test, how it was carried out?

A. It was very organized. NAID got with BIA several weeks before the test started. They gathered documents that they would enter into the legacy and enter into TAAMS so they could compare timing, accuracy, and reports to see if they matched. The only thing probably an improvement should have been is that it should have been tested against the software requirements, but they did test legacy against TAAMS.

Q. When you say against the software requirements, you mean the contractual requirements?

A. The requirements that we -- no. The requirements that we took

from the customer that made the software. So that was lacking, but the test was very well organized and they brought in multiple users from Billings, all the design team came in, they set up a room where the testers actually conducted the test. I was the only person there from ATS, GAO was there, and the design team actually went through reports and documented everything for the test.

Q. And how did the software perform?

A. Very well.

Q. Now, in its second quarterly report to this Court, the Department of Interior stated that this test, quote -- I'm sorry -- that the test showed, quote, "that the land title functionality of TAAMS was sufficient to initiate deployment to all BIA and tribal land records offices." End quote. Do you agree with that characterization?

A. Would you read it to me again?

Q. Sure. It says that this test, quote -- I'm sorry -- that the test showed, quote, "that the land title functionality of TAAMS was sufficient to initiate deployment to all BIA and tribal land records offices."

A. Yes.

Q. End quote. Do you agree with that?

A. I do.

Q. Okay. Now, during this task, did you have occasion to get anecdotal feedback from BIA users about their general level of satisfaction with the system?

A. They were very pleased.

McLeod 3052-54. After the deployment to the Rocky Mountain Region, DOI also deployed the TAAMS current title module to the Alaska and Southern Plains regions later in the summer of 2000. See Pl. Ex. 9, at 18.

____6. The Revised HLIP and First Quarterly Report

78. The revised HLIP submitted to the Court on March 1, 2000 contained a thorough and in many respects highly critical assessment of the status of TAAMS since Trial One. Although DOI has now acknowledged that the HLIP 2000 was a poor planning document from a management perspective, it most certainly does not "sugar coat" the significant problems that had been encountered in the TAAMS and BIA Data Cleanup subprojects. Far from constituting a fraud on the court, this document _ most notably the "Observations" portions included within both the TAAMS section _ frankly and accurately assesses the status of the subproject.

Most importantly, the HLIP 2000 addressed the significant changes and delays that had occurred from what was presented by DOI at Trial One. See Pl. Ex. 6, at 69 ("The original plan for modification and deployment of TAAMS has undergone considerable change since the unveiling of the initial prototype in June 1999"). For instance, the limited amount of time devoted to planning prior to system development was always acknowledged as a substantial risk, but one that DOI thought at the time was a risk worth taking because of the pressing need for reform. Id. But in the second half of 1999, it became clear that this lack of planning _ particularly the lack of an adequate knowledge of the variety of BIA leasing business practices _ would have significant adverse effects upon system development:

One of the most important observations made after the first prototype was released in mid-summer 1999 was that the initial design meetings did not fully capture the entire scope of the BIA's needed functionality. Furthermore, it became apparent that the lack of consistent business rules and processes across the BIA (many resulting

from statutes and probate laws that vary from state to state) placed the software vendor in a very difficult position as it attempted to modify the software to meet the BIA's needs. Although it was always assumed that additional adjustments would be necessary after the first prototype, it was initially believed that a large part of the basis functionality was present in the late-June 1999 release of TAAMS. This was not the case and it became apparent during the system tests conducted with BIA users during July and August 1999 that a significant level of analysis and system modification remained in order to ensure that all of the BIA's unique business practices were addressed.

Id. Trial witnesses have commented upon the accuracy of this statement in describing the effect that not adequately understanding BIA business practices would have upon the development process, particularly with respect to the leasing module. See Nessi 3296-97; McLeod 2998.

79. The HLIP 2000 also explained that this concern about BIA business practices was not solely one of having TAAMS adapt to the way BIA does business. In addition, it would be important to have BIA business practices change as well:

The Department's trust business processes need substantial review and standardization in order to take advantage of the efficiencies and flexibilities provided by modern software. This review process, like TAAMS, is on a fast-track for completion. However, given that the policies and procedures

subproject has not yet reached key conclusion, the TAAMS design team working with the system owner and user community had to make basic programmatic assumptions that may eventually require further system modification.
Id., at 71.

80. The HLIP 2000 also noted the significant data conversion (or migration) issues that had hindered the development effort:

> An unanticipated result of the frequent version releases was that the data migration did not have a consistent target from July 1999 through approximately September 1999. As a result, test conversions would have to be adjusted every time the underlying data structure was adjusted. With versions being released in a rapid manner, there were times when system testing was difficult because the data did not properly match the data structure.
>
> Furthermore, while the Billings data was sufficient for the legacy systems, it required significant modification for the TAAMS database structure. For example, fee owners in the legacy system did not need a unique identifier. However, in TAAMS, a unique identifier was necessary to ensure database normalization. This necessitated both an immediate business decision and a conversion process that would create a unique identifier. Each time a new version was released, all of these features would need to be reviewed to ensure that they did not conflict with some aspect of TAAMS not previously decided upon.

Id., at 70. The HLIP 2000 also explained that "the data conversion issues discussed above oftentimes interfered with a full test." Id. Elsewhere, the HLIP 2000 explained:

> Data conversion at future BIA and tribal sites will continue to be a challenge. Because each BIA office modified the legacy systems to fit their own needs and each legacy database is different, the TAAMS team cannot develop just one "data map" to fit all circumstances. Tribes which have already developed their own systems will have an even greater challenge.

Id., at 72. This language is consistent with the descriptions of the delays actually encountered during the system development process, as discussed above.

81. The HLIP 2000 also addressed several other significant problems that had affected the development effort. For instance, it noted that more significant training would be needed than had originally been anticipated because "the legacy systems and TAAMS were so different in approach, technology and concept." Id., at 70. It explained that system testing would be more difficult because of the number of releases. Id. ("Another unanticipated result of the design effort was that it did not lend itself to system testing in the traditional sense. Testing was conducted continuously after each version was released."). It noted limitations in the BIA telecommunications infrastructure that, although not a part of the TAAMS initiative per se, could impact system performance. Id., at 71. And it highlighted problems with the BIA's overall "information management culture," which it concluded "must be modernized to understand how modern information systems are managed." Id.

82. In addition, the HLIP and the First Quarterly Report each reported the earlier DOI decision to deploy the Title module of TAAMS prior to the Leasing module. Although admittedly not an in-depth description of the causes of and ramifications of this decision, the documents did disclose this decision at least three times. For instance, the HLIP 2000 explained:

> Because TAAMS provides functionality to different BIA realty operations, it is consistent with information technology 'best practices' to consider deployment of TAAMS on a functional basis as

opposed to waiting for the entire system to be completed. As such, BIA plans to deploy TAAMS to its title plants while continuing to test and solidify all aspects of the leasing modules, including the interface between TAAMS, TFAS and MMS."

Pl. Ex. 6, at 77. A similar disclosure is included later in the revised HLIP:

Deployment will be conducted in two phases. First, all Land Title and Records Offices will be deployed. Once TAAMS is fully operational in all LTROs, deployment to BIA and trial offices conducting the realty function will begin."

Id., at 81. And the same decision is reflected in the First Quarterly Report, also filed on March 1, 2000:

Since the time of trial, it has been determined that deploying TAAMS on a functional rather than a geographic basis is a better approach.

Upon completion of the pilot, BIA plans next to deploy TAAMS to those tribal sites where land records functions are performed under Self-Determination contracts or Self-Governance compacts.

Pl. Ex. 7, at 13.

83. There were also questions raised at trial about a statement by former Secretary Babbitt in a cover letter for HLIP 2000, to the effect that "[t]he Trust Asset and Accounting Management System (TAAMS) is operational at the pilot site in Billings, Montana." See Pl. Ex. 6, at ii. Referring to TAAMS as "operational" could, particularly in isolation, be read to suggest TAAMS was formally deployed in the Rocky Mountain Region, i.e., that it was in place on all desktops in the region and carrying out its core title and leasing functions as the system of record. As discussed in detail above, however, the remainder of the HLIP 2000 explains the status of TAAMS on March 1, 2000, including many obstacles that the TAAMS team had encountered since Trial One. It noted, for instance, that "pilot and parallel processing will continue [in Billings] until the user community feels comfortable with TAAMS and a decision is made to discontinue data entry into the legacy systems." Pl. Ex. 6, at 80. Those frank disclosures about the status of the system _ in particular the "Observations"in the TAAMS section _ are addressed above, and need not be repeated here. But the comments of the Court at a April 4, 2000 hearing make clear that _ after reading the HLIP 2000 as a whole _ the Court well understood that there had been significant problems encountered since Trial One and that TAAMS had not yet replaced the legacy systems. See Transcript of April 4, 2000 Hearing, at 7-10.

84. It also bears noting that various trial witnesses have offered differing opinions on the meaning of the statement in Mr. Babbitt's letter, in light of its reference to TAAMS

being operational "at the pilot site." For instance, the Court conducted the following inquiry of Mr. White about this issue:

THE COURT: But when you're giving that caveat about what you say, let me read you a sentence and see. This sentence is dated February 29th, 2000, and it said this: "The Trust Asset and Accounting Management System, TAAMS, is operational at the pilot site in Billings, Montana and we are currently working towards nationwide deployment in other BIA locations." What does that sentence imply to you? It's operational at the pilot site. What does that mean?

THE WITNESS: Well, being a pilot site, under the test conditions of the pilot, that means they are undergoing a pilot test and it's operational for that test. There are transactions being made. That's what I would get from that, that they are actively engaged in a pilot test of the system without having any other knowledge of what they might actually be doing. But the key word there is "pilot site," and to me, that's a test situation.

THE COURT: Because it said “pilot site.”
THE WITNESS: Yes, sir.
THE COURT: The key word is not “operational”?
THE WITNESS: Not to me.

White 2499-2500.

85. Mr. Nessi initially stated that this portion of Secretary Babbitt's letter was not accurate, but later expressed the view that it is at least subject to another reading. He first provided the following response to a question from Mr. Gingold:

Q. I'd like to turn your attention to the third paragraph. I'd like you to turn your attention to the third line from the bottom of that paragraph. It states as follows: “The trust asset and accounting management system (TAAMS) is operational at the pilot site in Billings, Montana, and we are currently working towards nationwide deployment in all -- in other BIA locations.” Is that a correct statement?

A. No, it's not.

Nessi 3396-97. The following day, while acknowledging that he did not participate in the drafting of the language and therefore could not state what was actually intended, Mr. Nessi stated that there is another reading of that sentence. Although it would not be correct to suggest that TAAMS was “a system that was producing information and that they were using to conduct business,” the sentence could be read to mean that the software itself is functioning. See Nessi 3672 (“Well, it's -- the term operational has taken on a number of different meanings over -- for different people through the -- through this process. To me, the term operational means that the software -- I'm speaking of just the software -- is working. The reverse side being it's not inoperable. I don't particularly know exactly what the Secretary means in this letter. It would be clearer if it -- if the sentence was expanded more to explain what he means by operational. From my perspective at that time, the software, the current title software in the Billings office was on the desktop, we had done a user test, and for the most part was operating.”). In light of the very detailed and frank disclosures about the status of TAAMS in the HLIP 2000, and in light of the ambiguous trial testimony on the meaning of the term “operational at the pilot site,” the submission as a whole plainly does not misrepresent the status of the system, much less constitute fraud on the court.

86. The totality of the disclosures on TAAMS included in the HLIP 2000 can only be described as frank and complete. Mr. Thompson voiced his agreement on the point in a colloquy with the Court in the contempt trial:

I think Mr. Nessi worked very hard in trying to describe the current

status of events in the amended HLIP section for TAAMS, because I worked very hard with him, telling him that, you know, we're no longer doing what you described and we have to re-describe it.

Thompson 1383. And Mr. Nessi expressed his view that there were good reasons for the changes to the development plan, and that the Court needed to hear them. Nessi 3344 (“When it became definite that we were going to redo the HLIP, by this time I had been expressing to management a number of concerns about the direction that the project had gone, and that for my feeling, they were reasonable for, you know, prudent management to go in these directions, but that they needed to have more explanation and more explanation than the HLIP itself would provide”). In short, it was DOI's unambiguous intention to provide the Court with a plain statement of the difficulties the project was facing, and the documents themselves did just that. They plainly contradict allegations of fraud on the court contained in the fourth specification.

7. Deployment and Implementation

87. Several trial witnesses have testified about the decision to provide an explicit definition to the

terms “deployment” and “implementation” in the early part of 2000. With the exception of Mr. Thompson, all of those witnesses took issue with the view that there was any improper motivation in providing definitions for those terms in early 2000 that might support Plaintiffs' charges on the fourth specification.

88. Mr. Nessi testified as to how this issue was raised in the first instance. He explained that, for some time many people, including himself at Trial One, used the two terms interchangeably. Nessi 3325-26. As system development proceeded, it became clear that there could be a significant period of time between when the TAAMS software would

be loaded onto individual computers and the time when it would be the officially designated system of record; this prompted Ed Cohen of the DOI Solicitor's Office to observe at a TMIP meeting that he was confused about the meaning of the two terms. Nessi 3325-26. Mr. Nessi explained:

A: The suggestion was made [by Mr. Cohen] to have -- make a definitive statement as to what each of them meant. I remember at the meeting that Daryl White contributed that the implementation would be synonymous with the system of record. And we developed the definition, and I don't recall if I did it myself or one of the contractors working for the project did, but from that point on we tried to be consistent with those two terms.

Q. Was there any suggestion made by anybody in these discussions that one might try to suggest that there had been progress when in fact there hadn't by defining these types of terms?

A. No.

Q. Was there any intention on your part to mislead anyone or give any false sense of progress in defining these terms?

A. No, and it surprises me [that this is an issue] because you always have both a deployment and an implementation, and we were just trying to put some clarity to the terms.

Nessi 3326. Mr. Snyder was in agreement with Mr. Nessi's recollection, testifying that “[t]here just seemed to be more -- everybody had different interpretations of what those two words meant, and so they were trying to come up with some way of defining it so that we were all -- at least understood the same thing.” Snyder 3326.

89. Ms. McLeod also testified that the definitions of the terms utilized by DOI are consistent with her experience in the information technology business. She addressed the issue first during her direct testimony:

Q. So overall, what was the purpose of defining these terms, as you understood them?

A. To keep it clear on exactly what was happening in the stage of the progress of the TAAMS.

Q. And what was your understanding of the meaning of the terms deployment versus implementation? Let me ask you first what your understanding was as to how BIA defined them during this time.

A. I'm not sure if BIA defined them. I mean, that's just a regular term for IT people. I mean, to us, it just means the software is sitting on the PC. I mean, sometimes we will say roll out, sometimes we will say deployed; it's the same thing.

Q. When you say the software is sitting on the PC, --

A. Yes.

Q. -- is that a definition of deployment or a definition of implementation?

A. That's just deployment. That doesn't mean that data is in the system yet or that they have been trained, or even if they have been through a background check yet.

Q. How do you understand the meaning of the term implementation in the IT context?

A. Implementation means that it is functioning, the people are in there using the system, they have been trained, data has been converted. It's actually the system of record, they are using the system.

Q. And is that consistent with your understanding of the way that BIA defined those terms around this time?

A. Yes. I mean, those are IT terms.

McLeod 3061-62.

90. Ms. McLeod was equally clear on the issue during cross examination by

Plaintiffs:

Q. Okay. Let me turn your attention to -- you testified regarding the word "deployment." Do you recall that testimony?

A. I do.

Q. And what was your definition of "deployment"?

A. Deployment was that the software was installed on a PC.

Q. Okay.

A. Implementation was that they had been through conversions and training and were actually using the software in production.

Q. And is that definition, is that a personal definition or is --

A. It's just an IT definition.

Q. When you say it's an IT definition, is it your suggestion that that is a generally accepted definition of that term?

A. As far as I know.

Q. And what are you referencing when you say as far as you know? I mean, what would be your reference point?

A. Just past experience. It's just a term I've always used.

Q. And so -- I'm trying to figure out, you know, how you learned that that term within IT circles means -- deployment means installing software on the computer. Is that something you learned at school or is that something you learned during your experience at ATS?

A. I don't know. I mean, it's a term we've -- I've always used. Deployment and implementation are different.

Q. Did everybody have the same definition of "deployment" within ATS that was working on the TAAMS project or did you have --

A. Yes.

Q. -- to have some discussion in that regard?

A. We did have a discussion about it, yes.

Q. And so people did have differences of opinion on that term?

A. No, they didn't have differences of opinion; we just wanted to make it clear what the difference was.

McLeod 3250-51. The testimony of Mr. Nessi, Ms. McLeod and Mr. Snyder make clear that the two terms were defined by DOI at this time solely in order to give clarity to their use among TAAMS project personnel, and in a manner entirely consistent with traditional and accepted IT terminology.

91. Nor was there any effort to mislead the Court in any fashion on this issue. In the revised HLIP that was submitted on March 1, 2000, DOI explained the meaning of these terms to the Court in precisely the same terms. See Pl. Ex. 6, at 81. Specifically, DOI stated:

Deployment begins with the loading of the TAAMS software on the desktops of the individual

workstations at the office site. For project management tracking, the "deployment date" reflects the above action. Upon loading of software, an extensive set of data reports will be provided to the office to review the converted data resident in TAAMS. These reports will form the basis for the initial activities conducted under deployment data cleanup.

The realty personnel at the deployment site will be required to carefully review the data reports and, with DataCom Sciences, Inc., make a determination regarding the completeness and quality of the converted data. The determination will include an estimated period of time in which the office will become familiar with TAAMS, initiate any immediate corrections to the database necessary to ensure that processing can be accomplished, adjust local work flows, and ensure that the local network and telecommunication infrastructure is properly functioning. The TAAMS project management team will also be involved in this determination.

Once the tasks are satisfactorily completed and the office is using the

TAAMS software full-time, the site will be considered "implemented." This period may be as short as two-weeks or as long as 120 days depending on the issues that must be addressed at that individual site. Pl. Ex. 6, at 81 (emphasis added).

92. Mr. Thompson was the only trial witness who questioned the use of these terms. He explained that, in his view, the term "deploy" meant that there "was an operating system in place being used by the users," that the term is not properly limited to loading the software into a computer. See Thompson 1150. Mr. Thompson recalled Mr. Nessi stating at the time "that his responsibility was limited to getting the software out there, not being responsible for deploying and bringing the system up," and Mr. Thompson felt that through these definitions Mr. Nessi "was attempting to limit his responsibility and role inappropriately." See Thompson 1151-52; see also Thompson 2007 ("the rationale Mr. Nessi offered [was] that he didn't sense it was his job to follow through and implement or install TAAMS beyond getting the software out there").

93. Mr. Nessi responded directly to Mr. Thompson's charge on this issue. He testified on direct examination as follows:

Q. Did you believe that your job as the top TAAMS project manager was finished once the system was actually loaded on people's computers?

A. No.

Q. Did you have a role after there was actual loading of the system on people's computers?

A. Yes, I did.

Q. And what other types of responsibilities did you have after that

occurred?

A. Where there would be a range of -- a range of things. Ensuring that the telecommunication network was sufficient in that particular office; that if they found any peculiarities in their own business process, to record those as a potential system enhancement; to work with the local management on any issues that they might come up with. I mean, there's a somewhat of a shift once the software is loaded on the desktop. The business, the local business people, the program people have to take a significant amount of responsibility to get the system acting as a system of record. But one of the things -- one of the things that we found was that in most of these offices we were going to have to deal with some data issues, and so I knew I would be very much involved with that.

Q. Did you ever express to anyone a view that defining these terms, deployment and implementation, might somehow limit your own responsibility in carrying out work with respect to TAAMS?

A. I don't believe I ever thought of it in terms of limiting my responsibility. The period from the predeployment period has a very different set of activities that are more technical in nature data conversion, load testing, training. From deployment to implementation -- well, let me go back to the first piece. Very little the local managers can do other than to ensure they have proper equipment in place and those sorts of things, and we had a full range of predeployment activities. Upon deployment, you have to get the local business people involved. I mean, they have to be there telling their employees they are going to be using TAAMS. They have to be supportive of the software. They have to ensure that the staff actually uses it. So it becomes much more of a partnership after the software is deployed.

Q. But did defining these terms, deployment and implementation, have anything to do with any desire, interest, goal on your part of limiting your own involvement in the TAAMS project?

A. Are you talking about the TAAMS project manager personally?

Q. Yes, you personally.

A. No.

Nessi 3326-28. Other than this testimony from Mr. Thompson _ which was directly contradicted by Mr. Nessi himself (and found no support in any TAAMS program documentation somehow limiting the TAAMS Project Manager's role to pre-deployment work) _ no other trial witness offered a similar view of DOI's motives in defining these terms.

94. The Second Report of the Court Monitor also attaches a February 23, 2000 memorandum from Wayne Nordwall, the Chairman of the TAAMS Field User Group, that raises a series of issues about TAAMS, including the manner in which the terms “deployment” and “implementation” were defined. See Pl. Ex. 2, Tab 7I. The primary purpose of Mr. Nordwall's memo appears to be to suggest to the Assistant Secretary for Indian Affairs that additional time is needed before TAAMS can be deployed on a national basis. Id., at 1. Mr. Nordwall recognized the progress that had been made on the project and “emphasize[d] that everyone believes that we (the BIA) can get the job done and that TAAMS will be a product that will meet our needs for years to come.” Id. Nevertheless, Mr. Nordwall conveyed his concern that “attempting to 'deploy' out of Billings at this time, while the system is not 'implementable,' may open us to accusations by the Cobell Court and the Congress that we are being deceptive about he status of TAAMS.” Id. But Mr. Nordwall never stated that he believed that there was any improper motive in defining these terms, but instead only raised a fear that the definitions would be interpreted as an effort to overstate progress on the project. In the absence of any direct trial testimony from Mr. Nordwall, this very limited statement simply has no bearing upon the issue.

95. In short, contrary to the assertions of the Court Monitor and the inferences of

Mr. Thompson, there was no effort to mislead the Court or to misstate progress on the TAAMS initiative through the definitions given these terms. The other witnesses knowledgeable about this issue at the time _ principally Mr. Nessi, Ms. McLeod and Mr. Snyder _ show that these were common definitions adopted solely to provide clarity to those working on the project.

____8. DOI Approach to Reporting

96. With the filing of the Second Quarterly Report (which, unlike the First Quarterly Report, was not accompanied by a revised HLIP), DOI was faced with the question of how subsequent quarterly reports would be organized and how information would be presented in them. Initially, the decision was made by the Trust Management Improvement Project committee that the reports would be organized around the HLIP 2000 and the four specific breach projects identified in the Court's December 21, 1999 Order. Mr. Thompson testified that:

... the position of the Department was that the high level implementation plan with a few other

pieces, including the breaches report, comprised the Department's attempt to come into compliance with the Trust Reform Act.
Thompson 1642; see also Slonaker 2304 ("I think there was a presumption by the Department that they should report on the progress under the high level implementation plan."). Mr. Thompson provided the following testimony on the process leading to that decision:

Q. Do you recall that you also testified that the decision was made in the formation of the quarterly reports that the reports would focus on the HLIP?

A. Yes.

Q. Now, do you recall, first of all, who made that decision to focus the reporting on HLIP and not the specific requirements of the December 21, 1999 order?

A. Well, I've testified before that there was some confusion about how to approach this reporting and there were meetings to discuss the content and format of a quarterly report. That would have occurred at a level I would characterize as the upper management, the trust management approval committee group, including myself and Assistant Secretary of Indian Affairs and others, along with the staff who was developing the report for the first quarterly report and the HLIP. I don't recall who took what position, but I would assume the consensus was among the group that the way to focus it was to report to the judge on the plan that had been presented to him during testimony at Trial 1 in July and August. That was what the obligation was perceived.
Thompson 1641-42.

97. DOI has acknowledged that this approach to reporting, i.e., reporting on progress against HLIP milestones, did not in all cases provide the most complete and comprehensive view of trust reform efforts. See, e.g., Pl. Ex. 66, at 6. In explaining how the Eighth Report would differ from the previous seven, for example, Secretary Norton stated:

[T]he style, methodology and content of this report differ from previous reports. We are introducing a new format that is designed to be more readable, and the information is based upon a methodology designed to document more objectively both accomplishments and lack of progress. The previous format focused on the steps we have taken and the completion of milestones. In retrospect, this format exacerbated the ordinary human inclination to report accomplishments and to ignore obstacles, difficulties and problems that were not directly related to the milestones. With this report, we have demanded that managers report both progress and problems. Our report also includes the key recommendations of outside management consultants who have criticized the current approach to some trust reform goals. The overarching goal is to provide the Court a more comprehensive and candid reflection of

trust reform.

Pl. Ex. 66, at 6.

98. But there has been no suggestion by any witness that the decision to organize the reports around the HLIP 2000 and breach projects was in any way motivated by any intention to limit the information presented to the Court or to misstate the progress that was or was not being made. In addition, DOI never hid from anyone that the reports would be organized in this fashion. Not only did the reports themselves follow that format, the Second Quarterly Report specifically explained the course that this and future reports would follow:

In the matter of Cobell v. Babbitt, the United States District Court for the District of Columbia on December 21, 1999, ordered the Department of the Interior (Department) to submit quarterly reports on

actions taken to correct breaches identified by the Court. These breaches relate to the Federal government's statutory trust responsibility to individual Indians. This is the second status report submitted pursuant to the Court's Order. This report documents two major subject areas: 1) actions and changes pertaining to the Revised and Amended High Level Implementation Plan (HLIP) that have occurred since the end of the reporting period of Quarterly Report #1, and 2) steps taken by the Department to rectify Court declared breaches of trust.

. . .

Subsequent Quarterly Status Reports will follow the format of this report.

Pl. Ex. 8, at 1.

99. DOI was also faced at the time of the Second Quarterly Report with the question of how much detail should be included within the reports about what had occurred during the reporting period. The order itself required DOI to file reports "setting forth and

explaining the step that Defendants have taken to rectify the breaches of trust declared today and to bring themselves into compliance" with the 1994 Act. 91 F.Supp.2d at 59. It also provided that reports "shall be limited, to the extent practical, to actions taken since the issuance of the preceding quarterly report." Id.

100. Interpreting the Court's order, DOI officials determined that the quarterly reports should report in a concise fashion upon progress that had been made against the specific milestones included in the HLIP. See, e.g., Def. Ex. E. An e-mail from Mr. Thompson to Office of Special Trustee officials working on the Second Quarterly Report, for example, provided the following guidance:

What is needed from each of you are specific, concise narrative descriptions of activities during the reporting period. Pertinent milestones are those either "due" or "ongoing" during the report period. One paragraph per Milestone is sufficient.

. . .

Note that each "narrative" is keyed to a particular Milestone from the HLIP. Head the narrative with the Subproject Title, in bold. Begin the narrative with the Milestone (per the HLIP) in bold, followed by a period. First sentence to read ... "This milestone was scheduled to be completed (use appropriate Month, Day, and Year. Tasks under this Milestone were (or were not) completed (use appropriate Month, Day, and Year). Then proceed to describe the specific activities leading to completion of the Milestone, providing a few specific, concise sentences showing how the Milestone was completed.

If the thrust of the Milestone was changed, or the Completion Date was changed, we must provide an explanation to the Court. If that is the case, start a new paragraph with the heading **Changes**., yes, in bold. Explain the change.

Id. (emphasis in original).

101. Mr. Thompson has also testified that, at the time the format and approach to

the quarterly reports was agreed upon, he and other decision makers believed that it was the type of reporting that the Court envisioned:

A. ... As I spoke before, last week or before, there had to be some decisions about what level of detail was going to be offered, and I will confess that I would be among the parties that wouldn't know where to start and where to stop at this point based on the last two, three weeks of testimony in term of what needed to be offered to the Court. This was part of that break down in communications that I probably contributed to. We probably needed a dialogue with the Court to find out just how much more information was needed. You could spend your entire time and your entire staff preparing reports about what's going on, what's not going on, and get away from doing trust reform, which would be a concern

for me, certainly.
Thompson 1709. Mr. Thompson made a similar point later in his testimony:

I think I testified previously that in retrospect, certainly we could have offered much more richness of detail and much more complete reports in the quarterly reporting, and the failure was one of not communicating with the Court and understanding the Court's desires completely. Again, we had to measure this against how much time and effort did we want to put into pure reporting versus how much time did we want to present for trust reform, or, in the case of OST, oversight of trust reform. It took people away from performing that duty and at some loss to trust reform, in my opinion.
Thompson 1743.

102. But the witnesses who testified at trial indicated that they never knew of particular false statements that were included within the quarterly reports to the Court at the time those reports were filed. See, e.g., White 2551-52. Mr. Thompson also testified that "[c]ertainly there was strong encouragement both from the attorneys' side and from the top management of Interior to provide quality reports that were complete and accurate and attainable." Thompson 1386. Even Mr. Slonaker, who of all trial witnesses may have been the most critical of DOI's quarterly reports as not providing complete information,

did not know of a single statement _ in the extremely voluminous reports submitted to the Court since he assumed responsibility for their preparation _ that was false. He testified:

Q. Looking back generally, thinking back about the quarterly reports that have been submitted since you have been the Special Trustee, and I guess that would be the third through the seventh quarterly reports, I take it that there were never any reports that were submitted to the Court when you were responsible for submitting that you were aware of that contained any false statements? Was there ever a time when a report was submitted when you knew that a statement that was included in it was false?

A. No, I wasn't aware that there was a false statement, but I became very uneasy, as we've said before in this testimony, as time went on that I was getting objective and complete information.

Q. Did you ever have any indication, any statement or any other indication from anyone at the Department, that they believed at the time that the quarterly reports were submitted that they knew that there was a statement that was in the report that was false?

A. I don't recall.

Q. Meaning you don't recall that happening?

A. I don't recall any.

Q. So the answer would be no, you don't --

A. I don't think so.

Q. You don't have any instance when that occurred?

A. I don't think so. If you're talking about a deliberately false statement, no, I don't recall that.
Slonaker 2417.

____9. System of Record

103. One of Plaintiffs' charges in the contempt trial has been that DOI was somehow deceptive when it reported to the Court that, effective at the end of 2000, TAAMS was the "system of record" for current title information in four regional offices. As explained below, that assertion is simply unsupported by the record.

First, disclosures to the Court have set forth the meaning of this phrase. The Special Trustee Observations section of the Fifth Quarterly Report defines the term as "meaning that it was officially

designated the system for the recordation and maintenance of Indian title documents reflecting current ownership" in those regions. See Pl. Ex. 11, at 5. The Special Trustee Observations also note that TAAMS is the system of record only "for current title processing in four BIA Regions," and that "title history data is not yet complete." Id. Similarly, the TAAMS section of the report notes that TAAMS is the system of record only "for current title" in the four Group A regions. Id., at 27. It explains that "title history data is not complete," and that "[a]s necessary, field staff will continue to supplement historical title information in TAAMS with data and information from legacy systems and hard copy data." Id. The Department thereby identified the distinction between having a TAAMS "current" system and a TAAMS "history" system, the latter of which was dependent on entering data or transferring it from legacy systems.

104. Nor does the Eighth Quarterly Report "confirm[] ... that the TAAMS current title module had not been properly designated as a system of record." See Pl. Ex. 98, at 10. The Eighth Quarterly Report notes, for instance, that "Rocky Mountain and Southern Plains regions use the ATS product [TAAMS] for virtually all current title activities." Id.,

at 123-24. In Alaska, the process of encoding title information directly into TAAMS is ongoing, a fact that has been disclosed in quarterly reports. Id.; see, e.g., Pl. Ex. 6, at 30 ("A very different condition exists in the Alaska Region, where no legacy systems exist. In this region, Data cleanup has entailed the copying of all pertinent trust records, shipping of the copies to a central facility in Albuquerque, NM, and direct entry into a new TAAMS database."). As a result, Department personnel receiving a request for Title Status Report for a property not yet in TAAMS make the processing of that property a priority, then issue a TSR from TAAMS. Pl. Ex. 98, at 123-24. And although the Court Monitor correctly notes that there are limitations upon TAAMS' inclusion of formal Title records in the Eastern Oklahoma region, those limitations do not, in context with the totality of representations on the status of TAAMS, suggest fraud on the Court.

105. In evaluating this issue, it is also important to bear in mind the overall context in which this issue arose. The term "system of record" was used in DOI internal document and reports _ without controversy _ long before the Court Monitor questioned it in his Second Report. See, e.g., Pl. Ex. 2, Tab 9D, at 2 ("system of record" synonymous with system "implementation"). In the Fifth Quarterly Report, also before the Court Monitor's Second Report, the Special Trustee expressed his opinion that:

> It is time for a decision by BIA Central Office to establish the TAAMS- Title Portion as the system of record in the Rocky Mountain Region. The same decision relating to the Alaska and Southern Plains Regions must be considered as soon as data is ready to support operations.

Pl. Ex. 11, at 6. There was no suggestion at this time that the use of the term was in any way improper or misleading.

---

106. Once questions were first raised by the Court Monitor in his Second Report, DOI investigated the matter further. In the Seventh Quarterly Report, first filed shortly after the Second Court Monitor Report, DOI noted the following:

> The TAAMS Title module is operational only in Group A (Rocky Mountain, Southern Plains, Alaska and Eastern Oklahoma) Regions, and the exact status of each of the four regional offices will be provided in the next quarterly report.

Pl. Ex. 13, at 33. As promised the Eighth Quarterly Report in fact provided just this information. Thus, once the propriety of the "system of record" label was identified as an issue by the Court Monitor, DOI

disclosed relevant information to the Court. This, again, is not fraud.

____10. Development of the Realty Module

107. The decision to deploy the TAAMS title module prior to the realty module prompted DOI and ATS to focus their attention primarily on the title functionality until the April 2000 UAT demonstrated that the title module was ready for deployment. In April and May 2000, ATS officials met with a BIA realty design team to get the design team's views as to the additional functionality that would be needed in the first release of the realty module. See McLeod 3085. Initially, the BIA team indicated that the first release should include all of the functionality in the original contract, including all items listed as "mandatory" and all items listed as "mandatory deferred." McLeod 3086. Between May and October 2000, ATS officials devoted their efforts to developing the additional functionality that BIA had requested, in conjunction with the BIA design team. McLeod 1086-88. These developments were noted generally in the Third Quarterly Report, filed

August 31, 2000. See, e.g., Pl. Ex. 9, at 3 ("Given the historical variances in business rules and practices among BIA agencies, BIA and OST are working to develop uniform business rules and practices. Once completed, these will be integrated into TAAMS"); id., at 18 ("A thorough and in-depth reanalysis and review of the original leasing, distribution and accounts receivable modules was conducted from May through August."); id., at 19-20 ("BIA and the Office of the Special Trustee are continuing to work on new business processes and procedures that will result in new business rules. In some cases these rules must be incorporated into TAAMS by the software vendor, requiring good documentation and sufficient planning to allow the software vendor time to incorporate them into the sytem and fully test them prior to official use.").

108. In October 2000, in order to confirm that the functionality ATS had been developing was what BIA in fact needed, ATS conducted a "transaction verification exercise," or "TVE." McLeod 3088-89 ("[W]e wanted the customers to come in and run the data through the screens, validate _ do we have the data conversion correct? Are they seeing the data where they expected to see it on the screens? Were we on the right track when they visually looked at the screens and reports?"). Ms. McLeod testified that the software itself was not fully refined at the time of the TVE, but that ATS wanted a "sanity check" on whether the functionality that it was attempting to incorporate would, when finally developed, meet the BIA needs. McLeod 3090 (the software was not "in a good enough state for a user acceptance test. We knew there would be problems and issues.... We just wanted a sanity check, we didn't mean for it to be such a formal test."). The TVE showed that there were still additional functions that the software would have to have in

order to meet what BIA users deemed their essential needs. McLeod 3090-91. This result was reported in DOI's Fourth Quarterly Report, filed on November 30, 2000:

> Preliminary results from the transactional verification analysis of the leasing module in the Rocky Mountain Regional Office and subordinate agency offices indicate that the vendor may need to make additional modifications to TAAMS before it can be used as the system of record in this region. The additional modifications are not major design changes, however they are integral to the leasing process and must be completed prior to its full-time use. The Third Quarterly Report indicated that the leasing, distribution and accounts receivable functionality of TAAMS would be redeployed to Rocky Mountain Region staff in September 2000. The results of the analysis mentioned above, however, resulted in additional work being necessary before this redeployment could take place.

Pl. Ex. 10, at 31.

109. Based upon these results, ATS worked with BIA in the first months of 2001 to create a more basic business model, in order to evaluate how TAAMS could fit with their business needs. McLeod 3091-93. Once those core needs were identified and a new version of TAAMS was created, IBM was asked to conduct an independent system test of the entire TAAMS functionality, including the leasing function. See McLeod 3094. The results of that test, included within IBM's report that was admitted as Defendants' Exhibit K, were discussed at length at trial. See Def. Ex. K; McLeod 3095-3104. In summarizing those results, Ms. McLeod noted that, out of 570 scripts run, there were only seven system errors. McLeod 3102. She also testified:

Q. And as a general matter, can you give me your overall impression about how this system test went?

A. The system test was very successful. We felt good about an outside party coming in testing it that wasn't so close to the project.

The software was strong. IBM made comments about they thought that the software looked good, that they looked [sic] the way it looked. They even commented on how strong they thought the test scripts were. So we felt very good about it.

McLeod 3096; see also Def. Ex. K, at 2 ("IBM Global Services' overall assessment of the system is that the functions as tested during this period appear to be sound and functions as defined for the test were met by the application."). The Sixth Quarterly Report was the next report to the Court after this April 2001 system test, and accurately characterized the generally positive results of this test. See Pl. Ex. 12, at 26; see also McLeod 3103-04 (agreeing with characterization in Sixth Quarterly Report that IBM's "overall assessment is that the functions are sound and met by the application").__

____11. Seventh Quarterly Report

110. Plaintiffs have also argued that the Seventh Quarterly Report was in some fashion part of a fraud by DOI. They have presented a two-pronged attack upon this report, challenging both the process through which the report was prepared and submitted to the Court, and the contents of the report. These two broad issues will be addressed in turn.

111. The primary catalyst for controversy with respect to the process for preparation of the Seventh Quarterly Report was a statement in the Special Trustee Observations section of the report that the Special Trustee "is not satisfied with the completeness or the quality of the information provided in this quarterly report." See Pl. Ex. 13, at 6. During examination at the contempt trial, Mr. Slonaker testified that he believed that the first draft of his Special Trustee Observations contained this language.

See Slonaker 2424-25. Later in the trial, however, DOI presented an August 17, 2001 draft of that Observations section in which no such language was included. See Def. Ex. O. It was only upon receiving a subsequent draft of the Observations section on August 24, 2001 that senior DOI officials learned of Mr. Slonaker's pointed criticism of the "completeness" and "quality" of the report that he has compiled.

112. On the next business day after receiving the August 24, 2001 draft of the Special Trustee Observations section that included this language, the DOI Solicitor forwarded a memorandum to Secretary Norton calling her attention to the language of the Special Trustee Observations and requesting a meeting with her to discuss it. See Def. Ex. P, Tab 28. Deputy Secretary Griles testified at trial that he and the Secretary were concerned about the language included by Mr. Slonaker, because there was an obvious need to present a truthful and accurate report to the Court. See Griles 3960. In order to ensure that Mr. Slonaker understood the seriousness of her attention to the issue, the Secretary sent a memorandum to him inquiring into the nature of his concerns and into whether, in his view, those

concerns were of such a nature that they would preclude DOI from filing a timely report just days later. See Pl. Ex. 4, Tab 1. That memorandum stated, in relevant part:

[I]n the final paragraph of the Observations, you noted a concern that "[t]he Special Trustee is not satisfied with the completeness or 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 that 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.

Pl. Ex. 4, Tab 1; see also Griles 3963 ("Q. Do you have any knowledge, Mr. Griles, as to why this communication back to the Special Trustee took the form of this written memo? A. Yes, he was not in town, and he was in Phoenix, and we felt a need to make sure that it was clearly understood that we needed to address the concerns that he had raised, and so any report that was submitted to this Court was, to the best of our ability, complete and accurate.").

113. In addition to inquiring from Mr. Slonaker as to whether he could verify the Seventh Quarterly Report, the Secretary's memorandum also noted that because the Department of Justice required "certification of the contents of the seventh report prior to it being filed with the Court," she would also "seek certification from the subproject managers who contributed to the report." Pl. Ex. 4, Tab 1. On the same day, then, the Solicitor requested that the Office of the Special Trustee present to each HLIP subproject manager and breach project manager a form certification for their portion of the report. See Def. Ex. P, Tab 30. Each manager was to be presented with the opportunity to certify "that he or she has provided complete and accurate information regarding the status of his or her project." Id.; see also Def. Ex. P, Tab 31 (Aug. 29, 2001 memorandum from Jim Douglas to HLIP/Breach Subproject Managers).

114. By August 30, 2001, only six of the fourteen subproject managers had certified the contents of their reports. See Def. Ex. P, Tabs 32-35. On August 31, 2001, the Office of the Special Trustee conveyed to the Solicitor's Office that Mr. Slonaker would not himself verify the report. See Def. Ex. P, Tab 36. On that same day, faced with large sections of a report that were not verified, DOI requested an enlargement of time of one month in which

to file that report. Id., at 2 ("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.").

115. By memorandum to the Secretary dated September 10, 2001, the Special Trustee responded to the Secretary's request for an explanation of the nature of his concerns about the information included in the draft Seventh Quarterly Report. See Def. Ex. P, Tab 37. Despite Mr. Slonaker's stated concern about the quality and completeness of the information in the draft report, however, the memorandum in fact focuses much more on the significant management problems plaguing several of the subprojects. It states:

Since assuming responsibility for compiling the Quarterly Reports for the Department with the third such report, I have noted a number of concerns about specific areas of trust reform in the Special Trustee's Observations section of the Reports (see Attachment 1). Many of those concerns were expressed in terms of the serious and complex management problems faced by the Department. Those concerns included, but are not limited to, the inability of the BIA [Data Cleanup] 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 these projects. Therefore, the problems are either not addressed or addressed ineffectively.

Id., at 1 (emphasis added). The memorandum then attaches portions of the Special Trustee Observations from the Third through Seventh Quarterly Reports, along with a short sampling of aspects of trust reform that "illustrates the difficulty of obtaining useful information on the status of certain subprojects." Id., at 2. The Special Trustee also notes that it was these management concerns that prompted the decision to retain EDS to

conduct a review of the HLIP and trust reform efforts more generally. Id., at 1-2.

116. In the weeks leading up to the new October 3, 2001 deadline for filing the Seventh Quarterly Report, DOI officials were cognizant of the fact that, on the one hand, Mr. Slonaker would not be willing to verify the report under any circumstances, but on the other hand, had suggested to the Secretary that the report should be filed as complete but subject to change. In the face of this contradictory advice, DOI decided to seek certifications from the individual subproject managers. Mr. Griles testified that he inquired whether subproject managers should be required to certify their portions of the report. See Griles 3965. According to Mr. Griles, both the Solicitor and Mr. Slonaker expressed concern about that approach, reluctant to take any action that might be perceived as intimidating. Id. Instead, the Solicitor distributed to the subproject managers a memorandum explaining the need to have accurate information in the report, and providing them with three options with respect to attesting to the accuracy of their portions of the report. See Def. Ex. P, Tab 39. Those options were:

1. If you cannot sign the attached [certification] as it relates to your portion of the 7th Quarterly Report, modify your portion of the report until you are comfortable signing the attached statement and return (a) the modified portion of the report, (b) the signed statement, and (c) a detailed written explanation of the modifications.

- OR -

2. If, after considering option 1, you cannot sign the attached statement, return a detailed explanation as to why you cannot sign the statement.

- OR -

3. Sign and return the attached statement (even if you previously

signed the certification transmitted to you by Jim Douglas by memorandum dated August 29, 2001). Id.

117. In response to this memorandum, many subproject managers submitted written certifications as to the accuracy of their portions of the report. See Def. Ex. P, Tabs 40-41. Gabriel Sneezy, Manager for the Appraisal Subproject, submitted a memorandum explaining that that portion of the Seventh Quarterly Report did not reflect his opinion with respect to the proper line authority over appraisers. See Def. Ex. P, Tab 42. Four subproject managers (Mr. Thompson, Mr. Lords, Mr. Moyers, and Mr. Fitzgerald) submitted a lengthy memorandum explaining their decision to choose "Option 2," i.e., not certifying their portion of the report. See Def. Ex. P, Tab 43. Those four managers raised a number of reasons for their decision; many focused upon a generalized anxiety relating to providing any form of information in this

litigation. For instance, they expressed concern that, in view of the contentious nature of the case, "we expect each and every statement, however innocuous, presented by the Department to the Court to be challenged at some point by either the Plaintiffs, the Special Master, the Court Monitor, and/or the Judge." Id., at 1. They continued:

While not government attorneys, we must assume that each of us have [sic] 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. Personal counsel does not represent most of us; given the numerous personal attacks upon careerists in this litigation, we feel considerably exposed.

Id., at 1-2; see also id., at 2 ("The Court Monitor has issued three reports highly critical of the Department's execution and reporting on trust reform, and, in the last of these report, the Court Monitor pointed out obvious discrepancies and ridiculed a Subproject Manager for certifying a Subproject's status."). Finally, one subproject manager, Kenneth Rossman, declined to certify in writing, but stated that he would do so orally. Def. Ex. P, Tab 44.

118. In response to these concerns, DOJ attorneys then spoke directly with those subproject managers who had declined to provide written certifications. See Def. Ex. P, Tab 45, at 3 n.2. Mr. Thompson, for example, testified that he told DOJ attorney Sarah Himmelhoch in a telephone conference that the information in the Information Collection Breach Project section of the report was accurate and complete:

Q. Did you have any discussions with Ms. Himmelhoch about the contents of this report or the contents of the transmittal letter prior to it being filed with the Court?

A. I had conversations with Ms. Himmelhoch regarding the information contained in the information collection breach subproject.

Q. And could you give me -- could you describe the nature of that conversation?

A. As part of the clearance process, the Department of Justice decided to orally interview those project managers who had not certified or surnamed the -- certified the report or had raised objections to doing that. I received a phone call from her while in attendance at a meeting in Albuquerque and we had approximately a 15-20 minute phone call and she queried me about the report, and in that session, I believe there was another person on line who took notes of the conversation.

Q. And what was her response, to the best of your knowledge? Ms. Himmelhoch's.

A. Her conversation with me was to ask a series of questions about the contents of the report and about my comfort level with the contents of the report for information collection.

Q. Did you inform her that you were not comfortable with --

A. No, I did not.

Q. You informed her you were comfortable with the report.

A. I told her that I believed that the information in the information collection breach project was accurate and complete.

Thompson 1500-01. The remaining subproject managers provided similar oral assurances, and the Seventh Report, along with Mr. Slonaker's comments and written statement from project managers, was ultimately filed on October 3, 2001. See Def. Ex. P, Tabs 45, at 3.

119. Turning to the contents of the Seventh Quarterly Report, neither Plaintiffs nor any contempt trial witness has pointed to any specific statements in the Report that were either false or misleading. Rather, the thrust of Plaintiffs' complaint about its contents has been that the document did not contain the level

of critical analysis that was contained in the series of EDS reports on TAAMS and BIA Data Cleanup and in the Eighth Status Report submitted in January 2002, and therefore did not report on the "true status" of these subprojects.

120. As an initial matter, DOI has itself freely acknowledged that the Seventh Quarterly Report _ like preceding reports _ did not contain the level of critical analysis that the Court expected. See Pl. Ex. 66, at 6 ("The previous format focused on the steps we have taken and the completion of milestones. In retrospect, this format exacerbated the ordinary human inclination to report accomplishments and to ignore obstacles, difficulties and problems that were not directly related to the milestones.").

121. But it also bears emphasizing that the quarterly reports were viewed by DOI

as very different in scope from the EDS reports. As noted at length above, the quarterly reports were organized around the revised HLIP, and generally reported progress against milestones contained in the HLIP. See generally Pl. Ex. 7-13. The various reports submitted by EDS, in contrast, have had a very different focus. The Seventh Quarterly Report itself explained the purpose and goals of the EDS inquiry:

> The EDS evaluation [of TAAMS and BIA Data Cleanup] will assist the Special Trustee to determine the redirection necessary for these project with respect to such matters as project management, software development, schedules, resources, functionality, contractors, system deployment, implementation, training, and documentation to ensure their success.

Pl. Ex. 13, at 5. In fact the November 12, 2001 Interim Report and Roadmap for TAAMS and BIA Data Cleanup in fact "raise[d] serious questions about the Department's continued reliance on the HLIP." See Declaration of J. Steven Griles, at ¶ 6, attached as part of Pl. Ex. 68. Because the two documents had entirely different aims, the fact that they did not report on these projects in the same way is not surprising and does not suggest any bad faith on DOI's part. To the contrary, the fact that DOI affirmatively sought EDS's objective evaluation of the direction of the project demonstrates its good faith efforts to advance trust reform.

122. In summary, there is simply no credible evidence _ must less clear and convincing evidence _ that DOI has intentionally carried out a scheme to defraud the Court with respect to TAAMS since March 2001. The trial proceedings have made quite clear that the quarterly reports have not contained the level of detail the Court expected. See, e.g., Thompson 1709. But the full picture painted at trial on these issues demonstrates that

contempt is not warranted.

B. BIA Data Cleanup

123. The fourth specification of the Court's show cause order addresses alleged fraud in reporting on both TAAMS and BIA Data Cleanup. Although the trial evidence on BIA Data Cleanup has been far more limited than TAAMS, it is equally clear that there should be no finding of fraud on the court relating to BIA Data Cleanup. Starting with the extensive disclosures concerning challenges facing BIA Data Cleanup in the revised HLIP, DOI has provided the Court with accurate information concerning the work done on that project. And of even more importance to the present charges, there has been no evidence whatsoever that anyone at DOI remotely attempted to mislead the Court about that project in any fashion. Although the quarterly reports and trial witnesses have acknowledged that those reports did not contain useful metrics on the progress of the overall data cleanup effort, the reason that those metrics were not provided was that DOI did not itself have them, a failure of management rather than of honesty. When judged against the entire record, the disclosures on this issue simply do not support a finding of fraud on the court.

1. Goals of BIA Data Cleanup

124. A very brief overview of the BIA Data Cleanup project places in context much of the evidence presented at trial. “The ultimate goal of Data Cleanup and Management is to ensure correct and updated data such that Indian trust records are accurate, meet management and operational standards, and establish permanent data integrity at all BIA levels.” Pl. Ex. 6, at 24. As explained in the revised HLIP, there are many sources of errors in electronic data:

The data maintained electronically in support of land title and resource management requires cleanup and reconciliation across systems. Incorrect or inconsistent data is the result of, among other things, a) multiple manual entries of the same information into the automated system, b) the tendency to use the same information inconsistently or unsystematically across automated systems and functions, and c) the use of different automated systems for the land resource management function.

Id., at 21.

125. The BIA Data Cleanup effort has focused primarily on preparing data for conversion from the existing legacy systems to TAAMS and then bringing that data up to a sufficient level of reliability and quality. Ridgeway 3759. As explained in the revised HLIP, the first step in this process is “pre-deployment” cleanup, which brings the data to a quality level that can support the initial TAAMS deployment:

Based on the results of the analysis task and the developed Data Cleanup Strategy, data/records needing cleanup prior to deployment of TAAMS will be addressed during this task at each geographic location. This includes necessary Data Cleanup to support the TAAMS Pilot and deployment, as well as all subsequent locations.

Pre-deployment Data Cleanup focuses on ensuring that “key” data fields such as tract number and owner ID are unique and correct, inconsistencies between the legacy systems are researched and amended as necessary. Eliminating these errors ensures that TAAMS data conversion can be processed effectively.

Id., at 30. “Post-deployment” cleanup then involves further review of the data, which is in many cases more efficient in TAAMS than in the legacy systems. Id., at 33. “Examples of post-deployment Data Cleanup include reviewing standard BIA reports, such a the Title Status Report, from the legacy system against TAAMS reports, addressing inconsistencies, researching and making corrections to data errors found during the conversion process,

using data anomaly reports to identify errors and entering document processing backlogs, such as completed probates.” Id.

126. Mr. Ridgeway provided further testimony concerning how this process was carried out. At the local offices where DataCom conducted cleanup, BIA would generate anomaly reports, a list of records that might have a certain type of error, for example multiple owner IDs. (See footnote 7) Ridgeway 3733-34, 3773, 3795; id. at 3772 (“BIA identifies data to be cleaned up and the priority in which that data is to be cleaned up.”). DataCom, in turn, would prepare a task plan for addressing the anomaly. Ridgeway 3734, 3773-74. DataCom personnel would address each instance of the anomaly, conducting research using hard copy, legacy system data and reports, and other data. Ridgeway 3735. DataCom would then make a recommendation to BIA regarding whether and how to correct the particular instance of the anomaly. If BIA then concurs with the recommendation, DataCom would make the change.

Ridgeway 3735-36. DataCom would keep track of its progress on a task basis. Ridgeway 3804, 3813, 3815.

2. Metrics for BIA Data Cleanup Project

127. Plaintiffs have never suggested that the information actually reported on BIA Data Cleanup in DOI's quarterly reports was false or inaccurate. Rather, the primary charge raised by Plaintiffs has been that those reports did not provide a comprehensive

description of the universe of work remaining to be completed on the entire project. In fact, DOI agrees that such a comprehensive description was not provided to the Court, and has in fact disclosed this fact repeatedly to the Court. But of particular relevance to this contempt trial, the evidence made clear that DOI simply did not have meaningful metrics describing the overall progress of the BIA Data Cleanup project, and that this was the reason that they were not provide to the Court. This may be a reason to question DOI's management of the project, but it certainly does not support a finding of fraud.

128. The Revised HLIP and subsequent quarterly reports discussed at length the fact that accomplishing data cleanup presented more difficult challenges than had originally been expected. One of the most serious challenges was understanding and planning for the overall scope of the project, in light of the diverse and significant data cleanup issues at the many BIA offices nationwide. In the revised HLIP, BIA reported to the Court the difficulty that DOI was encountering and would continue to face to accomplish BIA Data Cleanup and to measure progress toward the completion of the project:

One of the difficult aspects of the BIA data clean-up task is that the data needed to properly plan the effort from beginning to end, including precise milestones, are essentially unavailable. When the data clean-up process began in January 1999, the extent to which this factor would impact planning had not yet been determined. While the BIA has learned a great deal about the character of its data, it is difficult to quantify the extent of the data problem in any comprehensive manner. We have found that: 1) each BIA and tribal site's Data Cleanup issues are very different; 2) the nature of processing backlogs is difficult to assess; 3) the lack of uniform nation- wide legacy systems makes gathering information difficult; 4) data definitions differ from region to region and, in some cases, agency to agency within the same region; and 5) the BIA's business process has permitted regional variation in its data rules to the extent that key information such as the format of Indian owner identification

numbers differs considerably from one region to another.

Pl. Ex. 6, at 22; id. at 24 (“it is difficult to estimate a total cost and duration for the entire cleanup effort at this time”). Mr. Nessi explained that the nature of TAAMS, which works from a very large complex database with many interrelationships between data, made it difficult to present the full scope of data problems that had to be addressed through data cleanup. Nessi 3358.

129. Based on its initial data cleanup work at certain sites and its recognition of the difficulties explained above, DOI determined that it would take a decentralized approach to data cleanup. It explained in the HLIP that:

Some BIA sites present such great Data Cleanup challenges that it could be years before the data is sufficiently ready for system deployment using our initial standard. As a result, it was determined that a separate strategy would be determined for each Data Cleanup site, concentrating on ensuring that the most basic requirements of data integrity were met, such as elimination of duplicate records in the legacy systems.

Pl. Ex. 6, at 23. Each region, and offices within the regions, had been operating independently and had

developed their own processes for land title and resource management functions, including different uses of automated systems. Pl. Ex. 6, at 20; Nessi 3434 ("there is office and regional variation in practices"). Each region thus had its own data problems to fix for the data to work in TAAMS. As Mr. Nessi explained:

... the local office sets a priority with the data cleanup contractor. It was originally and initially determined that in terms of the BIA, only the local offices would have the best knowledge on what their data cleanup issues are. There is absolutely no way somebody sitting in Washington is going to be able to tell a local office what their data cleanup priorities are.

Nessi 3432. Although knowledge of the data cleanup issues resided in the local offices, the end goal for data cleanup was uniform throughout BIA, which was to have accurate and complete data in TAAMS. Nessi 3432; Ridgeway 3740-42. Thus, the data requirements of TAAMS, e.g. the fields in TAAMS, would set the standards for cleanup, but what would have to be done to clean data so that it was useable in TAAMS varied from office to office and would be determined at the local level. Nessi 3434-37. "Data cleanup begins with the local office. Data quality and data integrity begin with the managers at the local office." Nessi 3435.

130. In subsequent quarterly reports, DOI has struggled with the issue of how to report on progress of the BIA Data Cleanup effort, i.e., how to provide meaningful metrics to the Court. Starting with the Second Quarterly Report, DOI provided a general statement regarding the status of data cleanup in the various regions. Pl. Ex. 8, at 6-7. Limited metrics were offered in that Report, and in the third Quarterly Report. Id.; Pl. Ex. 9, at 7-9. DOI recognized that these metrics were unsatisfactory, and explained in the third Quarterly Report that "[t]he Special Trustee will . . . work with the BIA subproject manager to obtain meaningful metrics on the progress of the BIA data cleanup effort." Pl. Ex. 9, at 3. In addition, the Fourth Quarterly Report provided the metrics that DataCom was tracking. Id., at 15-16. These metrics showed DataCom's progress on addressing the anomaly tasks identified by local BIA staff at the various offices. For example, the report noted that of 1,961 cases involving the Muliple Owner ID Task, DataCom had completed 56%. Id.

131. In the Fifth Quarterly Report, this information regarding progress on the identified data cleanup tasks was put into chart form: "Data cleanup progress has been provided in chart form in Appendix B of this report to provide a more user-friendly representation of the project." Pl. Ex. 11, at 5 and 64-71. Those charts, as well as the text of the BIA data cleanup section of the Report, explain progress on various cleanup tasks at each region. Id. at 14-15, 63-71. The reported tasks are defined in Appendix A to the Report. Id. at 59-61. Additional charts were provided as Appendix B to the sixth Quarterly Report, though the Special Trustee expressed his concerns that the charts were not adequate, noting that progress measurement continues to be insufficient. Pl. Ex. 12, at 4.

132. In the Seventh Quarterly Report, the Special Trustee stated that he was "concerned, as indicated in previous quarterly reports, about the reliability of information provided for certain of the subprojects," including BIA data cleanup. Pl. Ex. 13, at 5. In a memorandum that was ultimately submitted to the Court along with DOI's Seventh Quarterly Report, the Special Trustee explained that his concerns included "the inability of the BIA subproject manager to obtain meaningful metrics to measure the progress of the BIA data cleanup effort." See Pl. Ex. 13, attached Memorandum re: "Seventh Quarterly Status Report to the Court" (September 10, 2001) at 1. He also explained that the charts provided in the fifth and sixth reports:

... were placed in the report in response to my efforts to get BIA to provide performance metrics for BIA Data Cleanup. These charts represent only the work accomplished by DataCom, the BIA contractor,

and show no work performed by BIA staff. Therefore, this information is not comprehensive in scope. . . For the 7QR, after weeks of negotiations and rework, the charts have been eliminated.

Id.

---

133. Numerous trial witnesses testified regarding their concerns that they were not able to provide meaningful metrics on data cleanup, though none suggested that DOI was in any way attempting to hide those metrics from the Court. Rather, the common assumption among all of the witnesses on the issue was that DOI itself did not have those metrics because it did not understand the overall scope of the project. For instance, Mr. Thompson explained that he was concerned with reporting on BIA Data Cleanup, in particular with the lack of meaningful metrics, because the reports did not provide "a complete discussion of all the data work that needed to be done." Thompson 55; id. at 58 ("I was never convinced that BIA had their arms around the seriousness or the scope of the BIA data cleanup effort."). As Mr. Thompson noted, the charts reflecting the work done by DataCom gave the "impression that great progress was being made, the data was almost fixed, but I didn't believe that was very representative of the actual status of the data." Thompson 93.

134. Similarly, Mr. Ridgeway testified that it is difficult to quantify the total universe of data clean-up because of the volume of the data, the complexity of the data, how the data is presented (in hard copy, microfiche, in automated legacy systems, in stand- alone PC-based systems), and the lack of standardization across BIA. Ridgeway 3740-41. To define the entire scope of the data cleanup project would require assessing the data at each of the BIA regional, agency and tribal offices because the offices business practices in terms of what data is captured and how it is represented is inconsistent. Ridgeway 3741- 42. And Mr. Nessi recognized the need for better metrics, but explained that, in light of the size and complexity of the task, he simply was not able to develop a clear and

comprehensive reporting methodology. Nessi 3358-59. Similarly, EDS commented that "[t]he number, complexity, and non-standardization of Title and Realty records within the regions have been barriers for DOI to estimate the total magnitude of the Title Data Cleanup task." Pl. Ex. 66, at 87 (EDS' Observations).

135. Despite the difficulty in performing a full data assessment, since July 2001, when the BIA Office of Trust Responsibility took over the BIA Data Cleanup project, "management efforts have focused on documenting the magnitude of the cleanup project." Pl. Ex. 66, at 79. To this end, during the reporting period, DOI conducted site assessments at four regional offices. Id., at 82. The Eighth Quarterly Report noted that "we are still gathering information on the types and volume of data cleanup by region. Each region is unique in how they enter data into the legacy systems. As we do the site assessments and load data into an automated system, we will undoubtedly uncover errors we have not encountered in other regions." Id., at 86. Although not yet a clear picture of the entire magnitude of the cleanup project, the Eighth Quarterly Report did provide "a list of task definitions and unit of measure for all data cleanup tasks currently in progress" by region. Id., at 94. In short, DOI continued to report the actual actions being taken in the BIA Data Cleanup project, and have been working to obtain a better indication of the total magnitude of the project such that its reporting of actions taken can be viewed in an appropriate context.

136. Plaintiffs have also presented assessments of the scope of the BIA Data Cleanup project, in which the Court Monitor extrapolated from what he generally learned of the status of cleanup at the regions. Although DOI has acknowledged that the data cleanup

effort has proceeded much more slowly than had been expected, and that much more work on the project

remains to be done, the evidence presented at trial has shed additional light on several core conclusions of the Court Monitor. For instance, the Court Monitor suggests that BIA Data Cleanup will take far longer than has been reported because "[a]pproximately 75% of the data that must be input into TAAMS throughout the Regions will require manual encoding from hardcopy records." Pl. Ex. 3, at 33. This figure was based on an estimate by DataCom. Id. at 19. But, as the Vice President of DataCom testified, the 75% figure related to the entry of realty data only, not to title data. Ridgeway 3747, 3748; see also Pl. Ex. 10, at 14 (noting that most of realty information will not be eligible for conversion from existing legacy systems because leasing activities are carried out using personal computer software or manually).

137. The evidence presented at trial also showed that data cleanup work in the Alaska Region has accelerated significantly since the beginning of the project, so that the manual encoding of title data can be expected to be finished within several years. More staff has been dedicated to the project, and the process for completing each tract has become more efficient. Ridgeway 3755-56. At the current rate, which has increased to 12 tracts completed per day, it would take about five years to complete the manual entry of Alaska title data. Ridgeway 3755. At the higher rate that DataCom expects to achieve, 20 tracts per day, completion will take between three and five years. Ridgeway 3756.

---

3. TIME Reporting

138. Contrary to Plaintiffs' charges, there has been no effort either to mislead the Court or to hide information derived from the TAAMS Information Migration Evaluation ("TIME") that was conducted by DataCom.

One of the methods that DOI used to provide a measure of the progress of data cleanup, was to determine the level of accuracy of the data in the TAAMS system through a statistical comparison of electronic data with hard copy records. See Pl. Ex. 6, at 30-33. This testing, called "TIME," involves the comparison of a sample of original documents against the information housed in TAAMS. See Pl. Ex. 9, at 9; Ridgeway 3742. Mr. Nessi believed that, instead of trying to determine the exact number of data problems that had to be addressed through cleanup, which would probably be impossible to do, the TIME testing would provide a measure of overall data reliability and accuracy in TAAMS. Nessi 3359. The accuracy rates derived from the TIME testing would serve to assist in monitoring the ongoing sufficiency of data cleanup. Nessi 3368.

139. In the fourth Quarterly Report, DOI reported the results of the first TIME test:

> Some 93 tracts were studied from the Lands Record Information System (LRIS), consisting of 541 documents that comprised 11 different types of actions. The legacy data was compared with the actual paper records to determine accuracy. TIME found that of the 541 documents studied, 33.4 percent had at least one error -- the majority being previous data entry errors on the part of BIA staff, as opposed to missing data. Of the total number of mandatory fields on all of the 541 documents (13,688 fields), 1,900 errors were discovered for an error rate of 13.88 percent.

Pl. Ex. 10, at 13. The error rates showed a serious deficiency, Nessi 3366, which was disclosed to the Court. DOI did not seek to hide the problems that the TIME test revealed.

---

140. The evidence presented at trial has also refuted any charge that Mr. Nessi "directed that the results of this TAAMS assessment were not to be published or disseminated." Pl. Ex. 3, at 27. Mr. Nessi explained that he never directed DataCom not to publish or disseminate results of TIME tests. Nessi 3369-70. This was confirmed by Mr. Ridgeway of DataCom. Ridgeway 3745.

4. Work of BIA Personnel on Data Cleanup

141. Plaintiffs have also attempted to call into question DOI's decision to focus its BIA Data Cleanup reporting on the efforts of DataCom personnel, rather than the work of BIA personnel. As the HLIP

explains, the data cleanup strategy was divided into seven phases, “four of which are accomplished by the Data Cleanup contractor.” Pl. Ex. 6, at 28. For most of the reporting periods, BIA Data Cleanup has involved the phases to be accomplished by the Data Cleanup contractor, Datacom. BIA Data Cleanup has primarily involved pre-deployment data cleanup, monitoring of data integrity, and post-deployment cleanup, all activities within the four phases to be accomplished by DataCom. Id. A contractor was used because BIA staff did not have the resources to do the data clean-up on their own. Nessi 3355.

142. Importantly, the testimony of several trial witnesses showed that BIA personnel did undertake data cleanup activities, but primarily as part of their routine day- to-day job, not as part of the specified BIA Data Cleanup subproject identified in the HLIP. Nessi 3355-56 (“other than BIA staff reviewing a transaction before it was actually entered into a legacy system, I don't recall ever a BIA employee telling me that they were actively working on data clean-up other than what they would be doing in their routine positions

anyhow. . . . I didn't know that they were doing any work.”). Mr. Thompson confirmed that BIA personnel did not undertake a significant portion of the BIA Data Cleanup work:

As we probed further and further, we learned later that there wasn't -- there wasn't really much of a dedicated staff on BIA on this project in the field. They were doing it in the course of their business.

Thompson 93-94.

As it turns out, the BIA didn't have teams or people fielded from their house dedicated or even working to a large extent on data clean-up. They were depending on the contractor to do data clean-up.

. . .

The fact of the matter is the BIA didn't have the staff to field major teams on the massive effort that was required. They are short-staffed today and were yesterday in order to even get their daily business done.

Thompson 177-78. That DataCom does most of the cleanup work was further confirmed in the Status Report to the Court Number Eight:

DataCom performs the majority of the cleanup work. Regional and agency BIA staff review and approve work submitted by the contractor, approve standard operating processes for correcting/encoding identified errors, assist with identification errors, prepare regional data cleanup plans, and provide the necessary cooridination and feedback between OTR and the contractor. While this report associates accomplished numbers with DataCom, BIA staff has contributed as listed above. Additionally, two of the regions are using BIA staff to supplement the contractor. The reader should not assume that BIA is not involved in the work or that their effort is not being reported.

Pl. Ex. 66, at 79.

143. In light of the evidence concerning the limited role of BIA personnel in data cleanup work, it was not unreasonable _ and certainly not in any way fraudulent _ for

DOI's quarterly reports to rely upon DataCom's reporting on its own employees' efforts in this project. As Mr. Nessi explained, “Datacom was doing, in my observation, all of the data clean-up work. I felt that that was a good way to take the actual report from the contractor and provide it to the Court. I mean, I didn't think there was anything more straightforward than providing that particular report.” Nessi

3356-57.

5. Other Aspects of Reporting on BIA Data Cleanup

144. In addition to the disclosures on the more specifically identified topics addressed above, DOI's quarterly reports contained repeated references to other challenges that the project was facing. While all of those disclosures cannot be recounted here, a sample shows that DOI did not hide the problems it faced.

145. Most notable among the disclosures is the Revised HLIP. As Mr. Thompson explained, "[i]f I go back to the March 2000 high level plan, I think there was a pretty good exposition there about the challenges for data clean-up and the impact." Thompson 177. For example, as explained in the revised HLIP:

In summary, the Department continues to learn from the Data Cleanup experience at every new site. Strategies are continually reviewed and changes made as warranted by the circumstances. While it is difficult to estimate a total cost and duration for the entire cleanup effort at this time, a few key observations can be derived. First, the data is not getting any better and immediate action is necessary.... Fourth, greater management attention in the area of data quality is essential to maintain the level of data quality as it arises. Finally, the data problems are the result of a lack of resources over an extended period of years that cannot be reversed without a permanent infusion of resources and the continuance of Data Cleanup activities over an extended period of time.

Pl. Ex. 6, at 24.

---

146. In the Third Quarterly Report, DOI noted that:

Indications are that the BIA Data Cleanup effort continues to present serious challenges and may delay implementation of TAAMS at some locations. For example, in the Rocky Mountain Regional Office (Billings), the historical records for land title and records are not complete and cannot immediately be placed into TAAMS until the missing electronic records are researched and entered into the legacy database.

Pl. Ex. 8, at 3. Similarly in the Fourth Quarterly Report, DOI stated:

BIA Data Cleanup will remain a difficult challenge from both a time and a logistical perspective. An important component of the data cleanup exercise is establishing metrics that indicate improvements in the data quality. BIA management is working with the data cleanup contractor to establish more precise indicators of progress and has set completion dates.

Pl. Ex. 10, at 6. In the Fourth Quarterly Report, Interior also informed the Court that the emphasis of BIA Data Cleanup had shifted to land title records. Id. at 13. It also explained that data cleanup efforts would be concentrated to correspond with the TAAMS deployment schedules for Groups A, B, and C. Id. at 14.

147. The Fifth Quarterly Report explains that, "[c]onsistent with the new TAAMS deployment approach, DataCom Sciences, Inc., the BIA data cleanup contractor, is concentrating its data cleanup efforts to correspond with the TAAMS deployment schedules for Group A, the Rocky Mountain, Southern Plains, Alaska and Eastern Oklahoma Regions. No ongoing data cleanup activities elsewhere are being curtailed, but all new activities will be focused on Group A sites." Pl. Ex. 11, at 13.

148. The Sixth Quarterly Report explains to the Court that:

The Special Trustee continues to be concerned about the progress in the BIA Data Cleanup project. Specifically, the project management

is not sufficient. . . The Special Trustee is also concerned that the contractor is not being provided appropriate direction in the field, and that progress measurement (as mentioned in previous Reports) continues to be insufficient.

Pl. Ex. 12, at 4. DOI also explained that data cleanup is focused on land title and records data, not on realty data. Id. at 12.

149. In the Seventh Quarterly Report, Interior explained that "the Special Trustee is organizing greater managerial support, oversight and direction, where necessary, for the HLIP projects, especially the critical TAAMS and BIA data cleanup efforts." Pl. Ex. 13, at 5. That report also noted that the Office of Trust Responsibilities revised the data cleanup strategy, and that the Data Cleanup Team would develop site-specific data cleanup plans for each Region based on the revised data cleanup strategy. The revised strategy would be presented to the Special Trustee during the upcoming reporting period. Id., at 11. Because the direction for data cleanup had not been changed for the period being reported, the seventh Quarterly Report followed the format of the previous reports and provided information on the ongoing data cleanup activities. Id. at 12-15.

150. The testimony presented at trial also showed that DOI officials sought to provide accurate and useful reporting to the Court, and that there was no intent to mislead the Court, to provide false information, or to leave out pertinent information. For instance, Mr. Nessi testified to the truthfulness of the reports that he assisted in preparing:

Q. Within that framework and while you were working on those reports, did you attempt to provide a truthful and accurate description of progress on the TAAMS and data clean-up projects during the relevant time periods?

A. Yes, I did.

Q. Did you ever attempt to provide a picture of the projects that was any better or any worse than what was actually a fair picture?

A. No, I did not. The instructions that I recall receiving from the Department were verbal and they were aimed at the specific milestones.

Q. Did you ever attempt to provide -- to mislead the Court in any fashion through these reports?

A. No.

Q. Did you ever hear anything from anyone else at BIA or see any other evidence that they were attempting to mislead the Court with respect to these quarterly reports?

A. No, I didn't.

Nessi 3348-49. Mr. Ridgeway also testified as to the accuracy of the reports that DataCom provided to DOI, which ultimately formed the core of the reports submitted to the Court:

Q. In submitting monthly reports that DataCom gave to the BIA, was there any consideration given to any supposed or possible need to show progress by BIA in submissions to the Court?

A. Only in terms of how the progress reports were formatted.

Q. Were the reports -- did they accurately report on the progress -- let me put it differently. Did they accurately report on what had been done during the period?

A. Yes, to the best of my knowledge.

Ridgeway 3910. This testimony, in combination with the specific disclosures contained in the reports themselves, make clear that there has been no fraud on the court with respect to BIA Data Cleanup.

IV. IT Security

151. DOI has never misrepresented the facts about the state of computer security of IIM trust data. Rather, as detailed below, on numerous occasions over the course of the past two years, DOI has candidly acknowledged to this Court the persistent problems facing the BIA vis-a-vis IT security.

__A. DOI's March 2000 Representations _ TRO Hearing

152. On March 7, 2000, plaintiffs filed a Motion for Temporary Restraining Order (TRO), claiming that the private contractors negotiating the Office of Information Resources Management (OIRM) move from Albuquerque, New Mexico, to Reston, Virginia were being provided access to confidential trust data in violation of, inter alia, the Privacy Act. In opposing this TRO request, Defendants emphasized that OIRM's move to Reston was an important first step toward getting a handle on the prevailing IT security problems. In this regard, Defendants submitted the Declaration of Assistant Secretary Kevin Gover, who declared that the move to the Washington, D.C.-area would mean increased management supervision over OIRM and this, in turn, would mean heightened accountability and, generally speaking, security improvements. See 3/14/00 Notice of Filing of Original Declarations (Declaration of Gover at ¶¶ 4, 6-7); see also Transcript of 3/7/00 Hearing at 26-27 (counsel for Defendants: "The delay would, of course -- if an injunction were entered, it would delay the improvements that Secretary Gover is trying to accomplish by moving this office to Washington so that it can be under closer supervision, and reorganized as necessary. It would also delay improvements in the computer systems that this contractor is also contracted to make."). Defendants also

provided this Court with the declaration of Executive Vice-President Daniel Marshall, III, of Interior Systems, Inc., the private contractor negotiating the move to Reston. He outlined many of the then-existing IT deficiencies at OIRM:

I have observed that systems applications fail on a daily basis; ISSDA reports to the Treasury Department have not worked since at least January; there currently exist no published standards or procedures; metrics are lacking for measuring application code changes, requirement documentation, data center run times or recovery help calls received; there exists no run books for the data center; and to my knowledge, Unisys software has not been updated since installation two years ago. Most importantly, there exists no written operating procedures or security manuals in the current work environment. ISI has been tasked to remedy these deficiencies during and after the relocation of OIRM from Albuquerque to Reston.

3/14/00 Notice of Filing of Original Declarations (Declaration of Marshall at ¶ 7). These deficiencies were then discussed in more detail at the March 7, 2000 TRO hearing. Specifically, this Court expressed its "shock[ ]" at the then-current state of OIRM affairs:

THE COURT: . . . . I must say, looking at this picture in the long range, which I look at it at, I was dumbfounded to read paragraph seven of this Marshall affidavit to say this whole critical system has no

existing published standards or procedures, has no application codes, no existing runs books, never been updated, no existing written operating procedures, no security manuals in the current work environment. I mean, to be this far down the road in trust reform, and I know you're trying to save yourself from this TRO, but this is the most shocking information I've seen yet, I think, since my whole trial here.

MR. FINDLAY: This -- this needs correcting.

THE COURT: It's very disappointing to read this kind of stuff. We have nothing now. You know, we have no safeguards now so we can't be any worse off, is what you're telling me. I mean, it's shocking what he has in that last paragraph, isn't it?

MR. FINDLAY: It is discouraging, Your Honor, I agree.

THE COURT: Discouraging, to say the least.

MR. FINDLAY: I agree, and it is all the more reason to get on with this. Make the move, get it under the thumb of management here in Washington, improve these systems.

THE COURT: We have no written operating procedures, no security manuals in the current environment. We have nothing. Boy, I just don't know how that squares with the trial we had, all the great plans Interior had. And you find the most critical system, the heart of everything we're operating now, and this is what you come in and tell me: We have nothing to protect any of this?

MR. FINDLAY: Your Honor, we're on the verge of correcting this, Your Honor. This is -- this is one reason that this step in trust reform is coming early in the process. Congress has directed the department to move with it quickly."

Transcript of 3/7/00 Hearing at 31-33. Ultimately, on March 7, 2000, this Court granted the plaintiffs' request for a TRO and the parties moved to the question of whether a preliminary injunction was appropriate.

__B. March 2000 Representations _ The PI Pleadings and Hearing

153. In their motion for a preliminary injunction (PI), the plaintiffs reiterated their position that IIM beneficiaries would be irreparably injured if BIA contractors, as part of the planned OIRM move from Albuquerque to Reston, were given access to certain electronic data systems that housed information relating to IIM trust accounts.

Defendants countered (i) that contractor access to IIM data was not prohibited by law and (ii) that, indeed, rather than putting IIM data at risk, the "relocation of OIRM [wa]s a positive step toward better serving the information technology needs of the BIA." 3/20/00 Opposition to Plaintiffs' Motion for Preliminary Injunction, at 2 (hereafter "PI Opp.").

154. Defendants stressed that the OIRM move to the Reston facility was necessary

"to remedy longstanding, material weaknesses in the functions of the office." PI Opp. at 4. In this regard, Defendants attached reports by Interior's Inspector General and the National Academy of Public Administration (NAPA). These reports chronicled both ineffective "'general controls over [BIA's] automated information systems at [OIRM]'" and necessary "personnel and major management and organizational reforms" at BIA. Id. at 5-7. For example, in a declaration attached to the Opposition,

Assistant Secretary Kevin Gover outlined some of the IG's findings: “Over the past four years, the Interior OIG has issued audit reports that found 22 separate findings regarding data security in BIA's OIRM of which 18 were determined to be high-risk. We believe that these issues can be resolved more expediently with closer management attention with the elimination of the geographic distance and the reorganization of staff.” PI Opp. (Declaration of Gover at ¶ 5). The OIRM move to Reston was deemed a “'critical first step' toward resolving” these “longstanding management problems at OIRM” and this, in turn, would “result in improved information technology services.” Id. at 9-10.

155. In their PI Opposition, Defendants, once again, made no attempt to hide the then-current IT security “deficiencies” of OIRM. To the contrary, they were freely acknowledged. For example, Defendants reiterated the findings of Interior Systems' Executive Vice-President, Daniel Marshall III. In his previously-filed declaration, Defendants noted, Marshall had observed that “'there exists [sic] no written operating procedures or security manuals in the current work environment.'” PI Opp. at 12 n.3 (quoting Declaration of Marshall at ¶ 7). Similarly, Edward Williams, another contract officer, emphasized that the move to Reston would facilitate the implementation of

“additional security improvements,” such as, “e.g., computer firewalls, etc.” Id. (Declaration of Williams at ¶ 18). Indeed, as Defendants also acknowledged in a subsequently-filed correction to their Opposition, there is “no evidence that BIA OIRM is in compliance with Appendix III to OMB Circular A-130.” 3/22/00 Correction to Defendants' Opposition to Motion for Preliminary Injunction and Motion for Emergency Hearing at 2. In this same pleading, Defendants also admitted that “we have not been able to locate [security] plans [for the IRMS and LRIS legacy systems] and that we have no basis to represent that they currently exist.” Id. at 2 & n.1. Once the OIRM situation “ha[d] been stabilized,” however, Defendants noted, the topic of “proper operational security plans” can then be “addressed.” Id. at 4. (See footnote 8) In short, Defendants' PI Opposition concluded that barring the OIRM move to Reston would have the effect of halting efforts to “improve the performance of an office with long-standing problems.” PI Opp. at 42.

---

156. At the preliminary injunction hearing on March 29, 2000, Defendants reiterated the core themes of the written PI Opposition. Thus, Defendants again outlined some of the critical IT security problems that faced OIRM. In particular, Defendants acknowledged (i) the lack of security plans; (ii) the lack of firewalls; and (iii) the general lack of OMB A-130 compliance. Defendants also noted that a private contractor _ SeNet International Corporation _ had been asked to “do an initial survey of the problem.” Transcript of 3/29/00 Hearing at 25. And as Defendants' counsel noted, the bottom line was that “[w]e have an unsecure system here.” Id. As Defendants also emphasized, however, these deficiencies could not be cured in a short period of time. Thus, Defendants' counsel pointed out, “I can't represent to you that everything is okay or that it is about to be okay.” Id. Rather, counsel emphasized, “[a] lot more needs to be done, ... But it's not going to happen overnight.” Id. at 26. Of particular note is the following exchange between Defendants' counsel and this Court:

[MR. BROOKS]: [The contractors are] doing the documentation, the documentation that should have been there all along. The documentation that is a prerequisite if you're going to have a security plan. I mean, my goodness, how can you not have a security plan? I've got -- the contractors are telling me there's not a fire wall. They said, "We don't need the access codes. If we want in there, we hack in. It might take us a few minutes." That's what we've got. We have an unsecure system here, and I don't want to go into, although we could submit some things in-camera -- there has been a initial survey of the problem, and that was performed by a contractor called C-Net [sic]. C-Net is also helping doing the risk plan for TAAMS. That would be a sensitive document. This is not okay, Judge. I can't represent to you

that everything is okay or that it is about to be okay.

THE COURT: How do we get there though?

MR. BROOKS: How do we get there? I think that the plan _

THE COURT: We have no security plan now?

MR. BROOKS: That's correct.

THE COURT: And OMB required the security plan in A-130; right?

MR. BROOKS: I'm sorry?

THE COURT: OMB required the security plan in --

MR. BROOKS: Oh, more than that. I'd be happy to give you a memorandum, Judge, where OMB has just issued a memo that says, “I've got news for you, 2002 budget, you don't meet A 130 requirements, you're going to have a hard time getting funding.” So actions have been taken be [sic] OMB. It's been a step, and you know more about this than I do, I'm sure, Your Honor. The Computer Security Act was the first step, and they went over to Commerce and said, "Promulgate some regulations for the actual technical aspects of it," and OMB handled the problematic side of it. And step-by-step OMB has increased the pressure to make sure that all of the various agencies come into compliance. BIA had taken the steps, and I'd be happy to show Your Honor right now, if you'd like to see it, the security survey that was begun, and that was -- I think it's dated January of this year when the record report came out, outlining the things that need to be done. A lot more needs to be done, but waiting for a security plan -- waiting for a security plan before contractors go in is basically like insisting that, you know, that dog can stay in the manger. He ain't going to eat hay, and he's not going to let anybody in who can use it. We've got to have the contractors in there because this organization didn't have it together. It needs to be moved. It needs to be documented, and that's how we're going to come into compliance with A-130 and all of the other requirements. But it's not going to happen overnight.
Transcript of 3/29/00 Hearing at 25-26. Ultimately, this Court declined the plaintiffs' request for a preliminary injunction and the move to Reston was allowed to proceed.

157. At page 4 of their 2/8/02 Submission, plaintiffs cite to a representation of government counsel at the 3/29/00 preliminary injunction hearing: “'[T]hey've got grown-ups in there to make sure that this data is secure. Now, is it going to be secure? Of

course it is.'” The plaintiffs have not provided this Court with this representation's proper context. That statement was made in the context of the threat of loss of data due to access by the move contractors. See Transcript of 3/29/00 Hearing at 23-24. And, in this regard, as the November 2000 Progress Report (discussed below) made clear, this prediction turned out to be correct because, as the November 2000 Progress Report declared, “no data was lost during” the move from Albuquerque to Reston. See 11/30/00 Progress Report at 6. In this regard, then, the statement “this data is secure”is consistent with government counsel's later admission (quoted above) that “[w]e have an unsecure system here.” Transcript of 3/29/00 Hearing at 25.

C. November 2000 Representations _ The Progress Report

158. On November 30, 2000, five days after the OIRM move to Reston was completed, Defendants provided this Court with an eight-page "Progress Report" on "significant developments since April 2000, including the successful relocation of trust data in Reston, Virginia, and the formal commencement of 'live operations' in the Reston data center." 11/30/00 Progress Report at 1.

159. As the e-mail traffic captured in Plaintiffs' Exhibit 73 chronicles, the process of drafting this Progress Report was begun soon after the conclusion of the April 2000 preliminary injunction hearing. See, e.g., DEF0040781 (5/24/00 e-mail from Stephen Swanson: "Attached is the latest draft of the OIRM report for the Court."). As these same e-mails document, however, this drafting process was a labored effort that involved the detailed input of many different participants from, inter alia, the Department of Justice, DOI, and SeNet. See, e.g., DEF0029637-38 (e-mail from Swanson: "I'd like to get a status report on SeNet's development of security plans."). Further, as Plaintiffs' Exhibit 73 also makes clear, for a variety of reasons, the OIRM move to Reston was delayed on several different occasions. See, e.g., DEF0038863 ("The decision to hold off the move for one week is a good one."). Thus, the drafting and re-drafting process of the November 2000 Progress Report continued throughout the Summer and Fall of 2000. See, e.g., DEF0038846-47 (6/21/00 email from Swanson to Phill Brooks referencing "draft filing"); DEF0038898 (11/21/00 email from Swanson to Sarah Himmelhoch: "Sarah: Thanks, I've incorporated your new suggested language and am double-checking the screening questions with BIA Personnel Security."). In sum, though diligently pursued in the post-preliminary injunction time period, the Progress Report was not ultimately filed with this Court until November of 2000.

160. In the Progress Report, Defendants first outlined some of the reasons why the Reston move took longer than expected. In particular, "[s]everal delays in the construction of the Reston facility occurred," due to design changes, permit delays, and lengthy floor space negotiations. 11/30/00 Progress Report at 2. Next, the Progress Report described the physical security measures taken at the Reston facility. Id. at 3-4. The Progress Report also explained how Defendants negotiated the data move from Albuquerque to Reston. In this regard, the Progress Report emphasized that, via utilization of a parallel testing approach, Indian trust data was not at risk of corruption or loss during the relocation period because a duplicate copy remained in Albuquerque." Id. at 5. Indeed, the Progress Report concluded, "[o]n the evening of November 24th, after the system was tested and verified, the BIA, in consultation with its contractors, determined that the relocation was successful and that no data was lost during the effort." Id. at 6.

161. The Progress Report also provided this Court with an update on the status of "information technology security." In this regard, the Progress Report reminded this Court that, "as of April, 2000, OIRM operations were not in compliance with all required information technology ('IT') security requirements." 11/30/00 Progress Report at 6. And, it was noted, such compliance was not yet in hand. To the contrary, the Progress Report declared, "[t]here is still significant work to be done in this regard." Id. However, the Progress Report further declared, "now that the new data center has been safely relocated, more effort can focus on long-term IT security matters." Id. To this end _ viz., the resolution of "long-term IT security matters" _ the Progress Report informed this Court that John Curran had been hired as the National Information Technology Security Officer in order to "oversee development of information technology security policy and plans." Id. Further, "the security function at the BIA's OIRM has been elevated to report directly to the Director of OIRM." Id.

162. The Progress Report also outlined the work that SeNet International Corporation had been assigned with respect to the development of Bureau-wide security plans. SeNet, the Progress Report

informed this Court, “has contracted to evaluate information technology security at the BIA and make recommendations for improvement and develop a security plan.” 11/30/00 Progress Report at 7. “As the first step” in the security-plan process, “SeNet issued a draft report in February 2000, the purpose of which was to define information security policies and procedures, describe the concept of operations as it relates to information security and document a system architecture.” Id.

“These guidelines cover a broad range of security issues, such as access to information, virus protection, encryption, backup procedures, security training, and periodic review of security controls.” Id. This February draft was in the process of revision, the Progress Report declared, but once it was finalized, then “the next phase of security plan development will begin.” Id. “This next phase will include the development of security plans for specific information technology systems (including the information technology systems utilized by OIRM), the development of updated policies and procedures, and the development of a security architecture. Furthermore, the BIA will develop security awareness training to be deployed during calendar year 2001. ” Id.

163. In sum, the November 2000 Progress Report informed this Court that “significant” IT security work remained to be done. In this regard, the Progress Report noted that work had begun _ but was not yet completed _ on the development of Bureau- wide security plans. The “first step” of this process _ to define information security policies and procedures, describe the concept of operations as it relates to IT security, and document a system architecture _ was close to completion. However, it was only after this initial “step” was finished, that policies and procedures could be updated and a system architecture developed.

__D. April 2001 Opposition to Special Master Motion

164. On March 30, 2001, the plaintiffs moved for a “Special Master Investigation of Interior's OIRM Management and Recommendations on Corrective Action and Disciplinary Action” (hereafter “Special Master Motion”), asking that the Special Master investigate, inter alia, purported security failures at OIRM. Defendants filed a

comprehensive response to the plaintiffs' Special Master Motion (hereafter “Opp. to Special Master Motion”). In their Opposition, Defendants confessed that “security at IRM has required significant improvement since the move to Reston.” Opp. to Special Master Motion at 3. The Opposition then outlined the security measures _ both physical and computer _ that had been completed since the November, 2000 move to Reston. Importantly, it also outlined the security measures still to be taken.

165. As to physical security, the Opposition noted that, in the wake of the Special Master's February 2001, on-site visit, several changes had been made, including (i) the implementation of 24-hour guard service; (ii) the addition of perimeter foot patrols; (iii) the adjustment of the data center doors to ensure automatic closure; (iv) the issuance of memoranda by both Deputy Commissioner Blackwell and the Deputy Director of OIRM (Ken Russell) to all OIRM employees reiterating the physical security rules and regulations; and (v) the connection of a computer monitor in the IT security room to cameras, thus permitting the monitoring (and recording) of activity in the data center, Unisys room, and corridors leading to the data center. Opp. to Special Master Motion at 4-6. Work still to be done with regard to physical security included the installation of card key readers and the provision of color-coded cards to those employees allowed access to the data center. Id.

166. As to completed computer security improvements, the Opposition noted, “[i]n the past year, Interior has embarked on several analyses of computer security at IRM” and has hired John Curran to “oversee development of IT security policy and plans.” Opp. to Special Master Motion at 6. Further, the Opposition declared that “Interior has developed

security awareness training" and that Mr. Curran was "in the process of implementing three levels of training for IRM personnel: security briefing for managers, computer users and IT staff." Id. at 8. Finally, the Opposition pointed out that Mr. Curran had developed an "Information Technology Security Program" (ITSP) that "provides a bureau-wide plan for meeting the statutory and practical requirements that accompany the use of IT processing, storage and transmission capabilities" and "prescribes the standards for IT security programs, in accordance with existing laws, regulations and Executive branch orders." Id. at 7.

167. As to future computer security improvements, the Opposition noted that "plans are underway for the protection of applications and support systems." Opp. to Special Master Motion at 7. Thus, it was pointed out, "SeNet has developed draft security plans for a number of major applications and general support systems." Id. These drafts were expected to be finalized in May of 2001. Id. The security plans, this Court was told, would provide "instructions and guidance to all system owners on steps needed to protect systems and data." Id. In addition, it was noted that "[a] plan to implement the ITSP is currently being developed." This ITSP implementation plan would "provide uniform risk mitigation requirements . . . along with short-term and long-term goals, policy statements, procedures and IT guidance." Id.

168. A copy of the ITSP, dated February 9, 2001, was attached to the Opposition. As Mr. Curran indicated in his June 13, 2001, interview with the Special Master (Plaintiffs' Exhibit 95), a second, revised ITSP was eventually published on May 17, 2001. See 6/13/01 Interview at 31, 42. This second ITSP was published because, sometime after April 25, 2001

_ that is, sometime after the first ITSP was submitted to this Court _ it came to Mr. Curran's attention that there were "some statements in [the first ITSP] that [we]re not necessarily true for the Bureau of Indian Affairs." Id. at 34, 39, 68. Mr. Curran explained to the Special Master that these inaccuracies arose because, in drafting the first ITSP, Mr. Curran used a department-wide "security planning document" as a model. Id. at 39-40. However, sometime after April 25, 2001, Mr. Curran subsequently discovered that "there were examples in [the department-wide security planning document] of security breaches that have happened in the department that were included in the [first ITSP] that have not . . . specifically occurred in the Bureau of Indian Affairs." Id. at 41; see also id. at 45 ("there were incidents cited as examples that did not necessarily happen or occur in the Bureau of Indian Affairs"). Thus, in the second, revised ITSP (issued on May 17, 2001), Mr. Curran noted on the first page that the "'[r]evisions made reflect that statements originally covering the entire DOI were not intended to cover the Bureau of Indian Affairs.'" Id. at 44 (quoting second ITSP). At the time the first ITSP was published to all BIA employees on February 9, 2001, however, Mr. Curran believed that all of the statements and information contained in the document were, to the best of his knowledge, true. Id. at 33.

169. The ITSP itself chronicled many of the then-current IT security deficiencies that still needed to be addressed. Thus, for example, the ITSP noted that the "Bureau currently handles [computer security] incidents in a semi-ad hoc manner. . . . [The Bureau] currently lacks the capabilities to respond in a complete and consistent manner to incidents." ITSP at 9. Further, the ITSP lamented that "[t]he Bureau makes use primarily of static passwords." Id. at 9-10. And, picking up on the theme of a number of earlier filings, see

supra, the ITSP noted that the Bureau's intrusion and detection monitoring "is incomplete and inconsistent." Id. at 10. In this regard, the ITSP flatly declared that "[t]he Bureau has been the victim of various internal and external based attacks." Id. Also, the ITSP acknowledged that "[c]ommonly known operating system and application vulnerabilities have frequently enabled intruders to compromise Bureau systems" and that there presently existed no formal procedure for making the successful countermeasures

"known to other vulnerable system owners." Id. at 11. Finally, the ITSP recognized the Bureau's "current approach to malicious code management is generally not complete or comprehensive." Id. As Mr. Curran noted in his accompanying declaration, however, implementing the ITSP _ and thus fixing the outlined IT security problems _ would "not happen overnight. It will likely take three to five years to fully implement the ITSP." Opp. to Special Master Motion (Declaration of Curran at ¶ 2).

170. In addition to the ITSP, an April 16, 2001, memorandum from Ken Russell to all OIRM management and contractor staff outlined several IT security tasks that still needed to be done. See Opp. to Special Master Motion (Exhibit 6). For example, though the Russell memo cited the successful completion of a Disaster Test on the Albuquerque NX Computer, the memo noted that this successful test would serve to facilitate the as-yet uncompleted task of finalizing "disaster recovery procedures to ensure continuity of operations if a real disaster at the Reston Data Center does occur." Id. (Exhibit 6, at 2). Other to-be-completed tasks were detailed in the Russell memorandum: (i) "[a] review of all user codes on the NX is being accelerated to ensure all inactive codes are deleted and all generic and embedded codes are reassigned or deleted"; and (ii) "[t]he NX Operational

procedures are being thoroughly reviewed to bring them in line with our current operating environment and to provide contract staff with a checklist to minimize operational errors." Id. (Exhibit 6, at 3).

171. Finally, the Opposition to the Special Master Motion noted that BIA had contracted with SeNet "for a comprehensive security study of the Reston facility based on the construction completed to date." Opp. to Special Master Motion at 6. This study was due to be completed in June of 2001 and would "include physical and IT security of the entire building." Id. Thus, it was apparent that even more security improvement work was anticipated.

172. Soon after DOI's Opposition to the Special Master Motion was filed, this Court directed the Special Master to conduct an investigation into "the trust data security systems in the custody or control of the Department of Interior." 11/14/01 Special Master's Report and Recommendation at 2. The Special Master's findings are detailed below. When these findings are compared to the representations made to this Court by the DOI (outlined above), one conclusion follows _ this Court had already been put on notice of many of the IT security deficiencies subsequently detailed in the Special Master's Report.

__E. The Special Master's Report and Recommendation

173. Following the Special Master's review of, inter alia, thousands of pages of reports and internal documents, his examination of the pertinent statutes and regulations, and his interviews of various private contractors and government employees, on November 14, 2001, the Special Master filed a 154-page Report and Recommendation (the "Report") with this Court. In his Report, the Special Master notes that "a fundamental

component of Interior's duty to monitor and verify trust information 'contained in and processed by the computer systems' necessarily includes an obligation to ensure its integrity." Report at 4 (quoting Cobell v. Babbitt, 91 F.Supp.2d 1, 45 (D.D.C. 1999)). The Report, then, chronicles "Interior's compliance with that duty." Id. And, in that regard, the Special Master bluntly concludes that Interior "has demonstrated a pattern of neglect that has threatened, and continues to threaten, the integrity of trust data upon which Indian beneficiaries depend." Id. at 153.

174. In arriving at his conclusion, the Special Master relied on a variety of methodologies. First, the Special Master "reviewed at least 30 reports generated by both governmental and private organizations . . . which have addressed the state of IT security at the DOI." Report at 17. The Special Master outlines the findings of these reports in considerable detail and, where applicable, their recommendations. See id. at 17-132. Second, the Special Master conducted a site visit of the OIRM Reston facility to assess the

physical security of that plant. Id. at 133. Finally, the Special Master tasked a private contractor (Predictive Systems) to "perform a vulnerability analysis of the DOI/BIA Internet Infrastructure in order to determine the overall security of the networks segments and hosts within the scope of engagement and to show whether it was possible to gain access to critical BIA systems and read, modify, or delete the data contained on those systems." Id. at 133-41.

175. Based on the above, the Special Master drew a number of conclusions about the state of Interior's trust data security systems. Most fundamentally, the Special Master concluded, "the system is in a current state of disrepair." Report at 148. For example, the

Special Master noted, "the lack of firewalls and adequate perimeter security" present "grievous risks threatening trust data." Id. at 144. In this regard, the Special Master indicated that Predictive Systems had managed to "penetrate[ ] the BIA's infrastructure." Id. at 137-38. Further, the Special Master asserted, "the manner in which [Interior] stores trust data violates public laws and federal regulations." Id. at 142. This "deplorable" state of disrepair, the Special Master ascertained, can be attributed in part to "the desperate need for adequate funding to overhaul [Interior's] IT Security program." Id. at 141, 143. Thus, the Special Master concluded, "Interior _ in derogation of court order, common-law, and statutory and regulatory directives _ has demonstrated a pattern of neglect that has threatened, and continues to threaten, the integrity of trust data upon which Indian beneficiaries depend." Id. at 153.

V. Proposed Reorganization of Trust Functions

176. The trial testimony also addressed DOI's ongoing efforts to reorganize its trust management functions. Not long after assuming the position of Deputy Secretary of the Interior, J. Steven Griles undertook work on the Department's Fiscal Year 2003 budget. Griles 3936. In connection with that budget work, he learned that the Special Trustee perceived a conflict between the performance of oversight functions and administrative tasks. Griles 3937. Mr. Griles also detected "inherent problems of lack of leadership and lack of direction" at the Bureau of Indian Affairs. Id.

177. Accordingly, an effort was launched to determine what organizational changes were warranted to address these problems. A group was formed that included, inter alia, Thomas Slonaker, Thomas Thompson, Assistant Secretary McCaleb and Donna Irwin.

Griles 3937. This group analyzed a number of possible options, and obtained input from those who had been engaged in previous efforts at organizational reform. Griles 3938. Options even included "taking trust functions entirely out of Interior, . . . as well as trying to bifurcate the Bureau of Indian Affairs . . ." Griles 3938-39. At one point, Mr. Slonaker prepared an organizational chart that formed the basis for additional discussion. Griles 3939. Secretary Norton received the group's recommendations. Griles 3940.

178. On November 14, 2001, Secretary Norton announced a proposed reorganization of Interior Department Trust functions. Griles 3940-41 and Defendants' Exhibit N. The proposed reorganization calls for creation of a new Bureau of Indian Trust Assets Management, headed by an Assistant Secretary who would be in overall charge of trust management. Griles 3941. The Assistant Secretary would report to the Secretary (and the Deputy Secretary, to whom everyone else in the Department is required to report in one way or another). Griles 3942 and Exhibit N.

179. Concurrently with the announcement of the proposed new Bureau, the Secretary also announced creation of the Office of Indian Trust Transition. Griles 3942 and Exhibit N. This Office, now headed by Ross Swimmer, will carry out trust reform efforts as a new organization is being created. Griles 3942. Mr. Swimmer previously served as an Assistant Secretary for Indian Affairs. Id.

180. Under the proposed new organization, the Office of the Special Trustee will continue to perform its oversight role on trust matters. The Special Trustee will continue to report to the Secretary. Griles

3943-44. The Special Trustee's oversight role is undiminished, and in fact is enhanced, by the new organization. Id. The Special Trustee

had expressed concern during the discussions leading up to the proposed reorganization that he had an inherent conflict with having organizational line responsibilities as well as oversight responsibilities. If I could draw an analogy, it would be like the IG [Inspector General] running part of the Department of Interior and his office having to oversee that part of the Interior. And so it's his viewpoint when we had these discussions, he thought that that was an inherent conflict.

Griles 3943. Other organizations within Interior, such as the Minerals Management Service and the Bureau of Land Management, may have functions transferred to the new Bureau as the reorganization takes shape. Griles 3944-45. But the nature of some of those functions may warrant retaining them in their current organizational structure. Id.

181. The Department has sought additional funding from the Congress for, inter alia, the proposed reorganization. Griles 3946. (See footnote 9) With regard to staffing, the Department will look for qualified individuals both within and outside its own ranks, taking into account the nature of the skills needed to perform the tasks critical to the trust reform effort. Griles 3947-48. Importantly, as highlighted by the Secretary in a colloquy with the Court, the proposed reorganization contemplates dedicated staff for the trust reform effort, i.e. individuals for whom such responsibilities are not commingled with other unrelated duties. Norton 4398-99. Some individuals who have previously served responsibly in positions related to trust administration may continue to have such

responsibilities. Griles 4183.

182. A number of factors bear upon current and future staffing decisions, one of which is the reasons for problems in prior performance. As Secretary Norton put it, “we are going to have to figure out how to use people to their best advantage, and how our human resources fit what best needs to be accomplished.” Norton 4393.

There are some . . . that I [Secretary Norton] have not worked with personally, and we are just going to have to be evaluating people and seeing where they fit. There are some people that may have done a poor job because they were doing five other things in addition to trust reform, and they may not have had the resources to do what they needed to do, or they may not have had the training to do what they needed to do. And so those people, given the right circumstances, might turn out to be good managers.

There may be other people that really need to look at doing other activities, and as we go through and figure out how our organization needs to be responsive to the tasks we have to accomplish, we are going to have to look at who is the best available talent for the particular jobs, and that's something we'll have to do on a case-by-case basis.

Norton 4394.

183. Consultation with affected parties concerning the proposed reorganization has been commenced. With respect to the timing of the initiation of that process, Deputy Secretary Griles testified:

[i]t started as soon as we were in a position to present to any of the Indian leaders in the country our viewpoint, but -- as to what we were proposing. The earliest time that we had any meetings with any tribal leaders I believe was around the 14th of November in which Mr. McClaub [sic] was meeting with all the self-governance tribes, and at that meeting he told them of what his -- what the plan was that we -- the Secretary had endorsed, and how we were moving forward.

After that we started formal consultations through the Federal Register. We've had -- and I believe it's six at this point -- formal public meetings around the country, including Alaska. We had one here on Friday here in Washington, D.C.

* * *

[W]e really felt that it was important that before we talked about this to anyone we had some concrete ideas to present to the Indian leaders so they could respond to them, and that's why we wanted to get something in hand that was based on some understanding of what the issues were and how best to deal with them.

Griles 3953-54.

184. Undeniably, opposition _ in some cases strong opposition -- to the reorganization has been expressed. But the process has gone forward, and a task force consisting of tribal representatives from each of the twelve regions has been formed. Griles 3954.

185. At a meeting of that task force with Interior officials _ including the Secretary and Deputy Secretary -- in Shepherdstown, West Virginia, task force representatives made several presentations, and some areas of agreement were reached on how to go forward. Griles 3954, 3956. In fact,

[t]here were three specific agreements that were reached with the tribal leaders. They agreed to set up three subcommittees, three sub-task forces, maybe, as I understand it. The first two, one will be on protocols, on how the task force will interact with Interior. The second part of it will be that they asked if they could be part of our EDS contract analysis on what are the business processes and procedures that Interior currently is engaged in trust management, and how we should manage those differently, how should we reorganize those. So we merged that into a work force, into a task group, and they will meet, I believe it's February 14th in Portland, Oregon, to

formalize and finalize that.

The third aspect of it was an agreement to look at all the organizational proposals and integrate those with the business process analysis so that they could understand the process analysis of business and the organizational analysis, we merged those two together, and EDS would evaluate their draft organizational charts, our draft organizational charts, and to try to figure out what was the best organization that EDS would give us advantages and disadvantages, and we would do this in a consultative manner.

Griles 3956. Additional meetings of the task force and Interior officials were scheduled for March 2002. Griles 3957.

186. The consultation process has far to go. Tex Hall, for instance, estimated that it should take one year. Hall 4506-07. Yet there has been positive movement:

THE COURT: The consultative process that started with just an attack on this plan, though, is developing into something constructive, you think?

THE WITNESS: Judge, yes, it is. If I may, the Secretary at the close on Sunday night asked the tribal leaders what should she tell Congress, and in almost every instance they suggested that she should tell Congress that a lot of progress was being made, that this was a -- that trust had been established between Interior and the tribal leaders and that they wanted to have the opportunity to work constructively with us to make -- to try to do meaningful organizational change.

Griles 3958. And at least on some broad questions, a consensus appeared to emerge at the

Shepherdstown meeting:

During the day the question was asked is there a single tribal leader here who doesn't think we need to modify and address some of these issues in terms of the way the Bureau of Indian Affairs is organized, and not a single tribal leader I think objected. Maybe one or two didn't raise their hands, but

it was almost 90 percent or 95 percent indicated they thought we needed to do something to address the issues with BIA.

Griles 3958. Mr. Hall himself testified that, although he was disappointed with Secretary Norton's testimony to Congress, the Shepherdstown meeting had been a good one. Hall 4478-79.

Conclusions of Law

I. Legal Standards

A. Contempt Standards

1. Nature of Civil Contempt Remedy

1. District Courts have the inherent authority to enforce their orders through the exercise of their contempt powers. See Shillitani v. United States, 384 U.S. 364, 370 (1966).

2. A civil contempt action is "a remedial sanction used to obtain compliance with a court order or to compensate for damages sustained as a result of noncompliance." Food Lion, Inc. v. United Food & Commercial Workers Int'l Union, 103 F.3d 1007, 1016 (D.C. Cir. 1997), quoting National Labor Relations Board v. Blevins Popcorn, 659 F.2d 1173, 1184 (D.C. Cir. 1981).

3. "[T]he 'extraordinary nature' of the remedy of civil contempt leads courts to 'impose it with caution.'" S.E.C. v. Life Partners, Inc., 912 F. Supp. 4, 11 (D.D.C. 1996), quoting Joshi v. Professional Health Services, Inc., 817 F.2d 877, 879 n.2 (D.C. Cir. 1987).

4. In light of the severity of the contempt sanction, it should not be resorted to "if there are any grounds for doubt as to the wrongfulness of the defendants' conduct." Life Partners, 912 F. Supp. at 11, citing MAC Corp. v. Williams Patent Crusher & Pulverizer Co.,

767 F.2d 882, 885 (Fed. Cir. 1985).

2. Elements

5. A party seeking civil contempt must show: (a) the existence of an order that is clear and reasonably specific; and (b) that the alleged contemnor violated the order. Armstrong v. Executive Office of the President, 1 F.3d 1274, 1289 (D.C. Cir. 1993); see also Life Partners, 912 F.Supp. at 11 (In order to be held in contempt of court, a party must violate "a definite and specific court order requiring [him] to perform or refrain from performing a particular act or acts with knowledge of that order."), quoting Whitfield v. Pennington, 832 F.2d 909, 913 (5th Cir. 1987), cert. denied, 487 U.S. 1205 (1988); Project B.A.S.I.C. v. Kemp, 947 F.2d 11, 16-17 (1st Cir. 1991) ("For a party to be held in contempt, it must have violated a clear and unambiguous order that left no reasonable doubt as to what behavior was expected and who was expected to behave in the intended fashion").

6. In determining whether an order is reasonably specific, "the party enjoined must be able to ascertain from the four corners of the order precisely what acts are forbidden." Project B.A.S.I.C., 947 F.2d at 16-17.

7. If the order in question contains any ambiguities, the court has to resolve those ambiguities in favor of the respondent. See United States v. Microsoft Corp., 980 F.Supp. 537, 541 (D.D.C. 1997), rev'd on

other grounds, 147 F.3d 935 (D.C. Cir. 1998), citing Common Cause v. NRC, 674 F.2d 921, 927-28 (D.C. Cir. 1982).

---

3. Burden of Proof

8. A party seeking contempt must prove the elements of contempt by clear and convincing evidence. See NLRB v. Blevins Popcorn Co., 659 F.2d 1173, 1183-84 (D.C. Cir. 1981).

9. The "clear and convincing evidence" standard requires the Court to "reach a firm conviction of the truth of the evidence about which he or she is certain." See United States v. Montague, 40 F.3d 1251, 1255 (D.C. Cir. 1994). This standard:

... is most akin to the process of evaluating testimony "in a light most favorable to the defendant;" the fact finder must recognize the evidence with respect to which he or she is uncertain, and put that evidence in the defendant's pile. This does not mean to suggest that a fact finder must view all of the pieces of evidence in isolation of each other, but does mean to emphasize that the fact finder give the benefit of the doubt to the defendant. Thus, under the clear and convincing evidence standard, the judge would view the evidence ... "in a light most favorable to the defendant."

Id.

4. Contempt and Declaratory Judgments

10. The D.C. Circuit has held unambiguously that alleged noncompliance with a declaratory judgment cannot serve as the foundation for a finding of contempt. See Armstrong, 1 F.3d at 1290, quoting Steffel v. Thompson, 415 U.S. 452, 471 (1974). The D.C. Circuit has reasoned:

[E]ven though a declaratory judgment has "the force and effect of a final judgment," 28 U.S.C. § 2201, it is a much milder form of relief than an injunction. Though it may be persuasive, it is not ultimately coercive; noncompliance with it may be inappropriate, but is not contempt.

Id., at 1290 (emphasis added); see also Perez v. Ledesma, 401 U.S. 82, 125-26 (1971).

---

11. The Supreme Court's decision in Steffel, from which the above quoted citation derives, makes the same point in equally unambiguous terms. The plaintiff in that case sought injunctive and declaratory relief from a criminal trespass law, which he claimed was unconstitutional. After the district court dismissed the case, the Supreme Court concluded that, though an injunction against enforcement of the statute would not be appropriate, declaratory relief might be. In reaching that conclusion, it noted that "different considerations enter into a federal court's decision as to declaratory relief, on the one hand, and injunctive relief, on the other." 415 U.S. at 1221, quoting Zwickler v. Koota, 389 U.S. 241, 252-55 (1967). For one, a declaratory judgment "will have a less intrusive effect on the administration of state criminal laws." Id. After a lengthy discussion on the point, the Supreme Court concluded with the same language quoted above in Armstrong. Id., at 471.

12. Plaintiffs are mistaken when they suggest that "the holding of Armstrong is dicta." See Plaintiffs' Memorandum of Points and Authorities in Opposition to Motion for Judgment on Partial Findings for Specifications One, Two and Three of the Court's November 28, 2001 Order to Show Cause ("Rule 52(c) Opp."), at 20 n.20. As an initial matter, it is of course impossible for the "holding" of a case to be "dicta." But more importantly, the relevant language of Armstrong was in fact a core holding in the case. The court of appeals' subsequent Armstrong decision, Armstrong v. Executive Office of the President, 90 F.3d 553 (D.C. Cir. 1996), cert. denied, 520 U.S. 1239 (1997), does not in any way call into question the core holding of the earlier decision that a declaratory judgment cannot serve as the foundation for a contempt finding.

13. Plaintiffs are also mistaken when they suggest that contempt may be

appropriate where a party is not alleged to have violated a court order. See Rule 52(c) Opp., at 21-23. ("numerous courts in this Circuit, as well as the United States Supreme Court, have found contempt to be an appropriate remedy in the declaratory relief or interim order context"). The cases they cite simply do not support the proposition asserted:

2 * In Food Lion, for instance, the Court of Appeals explicitly noted that the contempt finding was based upon the violation of a discovery order. See 103 F.3d at 1016. Although the order at issue required compliance with a subpoena, id., at 1015, the ruling on its face addressed compliance with the order itself.

3 * Nowhere in United States v. United Mine Workers, 330 U.S. 258 (1947), did the Supreme Court suggest that contempt might be based upon anything less than the violation of an order. The issue arose "in the declaratory relief ... context," see Rule 52(c) Opp., at 21, only because the underlying action was one in which the government sought a declaratory judgment, a fact that is irrelevant to the contempt issue. The contempt allegation involved alleged noncompliance with an order.

4 * Similarly in Lander v. Morton, 518 F.2d 1084, 1085 (D.C. Cir. 1975), Doe v. General Hospital of the District of Columbia, 434 F.2d 427, 429 (D.C. Cir. 1970), and Brotherhood of Locomotive Firemen & Engineers v. Bangor & Aroostook Railroad Co., 380 F.2d 570, 574 (D.C. Cir. 1967), cert. denied, 389 U.S. 327 (1967), the contempt finding was based upon an alleged violation of an order. Although the underlying cases sought declaratory judgments, this fact, again, had no bearing upon the contempt issue.

Plaintiffs' tortured efforts to distinguish the reasoning of Steffel v. Thompson, see Rule 52(c) Opp., at 25-31, are equally unavailing. In short, there is nothing in the case law of the Supreme Court, this circuit or any other circuit, that would call into question the clear and unambiguous holding of Armstrong that alleged noncompliance with a declaratory judgment could not serve as the foundation for a contempt finding.

---

5. Good Faith Substantial Compliance

14. A party charged with contempt may defend itself on the ground of "good faith substantial compliance" with the court order. See Food Lion, 103 F.3d at 1017 & n.16 (assuming the existence of the defense); see also Cobell v. Babbitt, 37 F.Supp.2d 6, 9-10 & n.3 (D.D.C. 1999) ("[a]lthough the viability of this defense has not been squarely resolved in this circuit . . . the plaintiffs have not made such a challenge in this case.").

15. To demonstrate good faith substantial compliance, the respondent may demonstrate that it "'took all reasonable steps within its power to comply with the Court's order.'" Food Lion, 103 F.3d at 1017 (citations omitted).

B. "Fraud on the Court"

16. The ability to respond to and punish fraud on the court is, like the contempt power, among a court's inherent powers. See, e.g., Hazel-Atlas Glass Co. v. Hartford- Empire Co., 322 U.S. 238, 244 (1944), rev'd on other grounds, Standard Oil of California v. United States, 429 U.S. 17 (1976). Most cases addressing the concept have arisen where a party seeks to set aside a judgment already entered, invoking either the court's inherent power or Federal Rule of Civil Procedure 60(b), or both. See, e.g., Hazel-Atlas, 322 U.S. at 244-45; Transaero, Inc. v. La Fuerza Area Boliviana, 24 F.3d 457, 460 (2nd Cir. 1994). Courts have also invoked their power to punish fraud on the court during the pendency of a case, where a party's fraudulent actions have fundamentally undermined the court's ability to adjudicate the matter. See, e.g., Aoude v. Mobil Oil Corp., 892 F.2d 1115, 1118 (1st Cir. 1989); Synanon Church v. United States,

579 F.Supp. 967, 972 (D.D.C. 1984), aff'd, 820 F.2d 421 (D.C. Cir. 1987).

17. The standards for determination of both types of alleged "fraud on the court" are the substantially the same, and require a showing of intent:

A "fraud on the court" occurs where it can be demonstrated, clearly and convincingly, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party's claim or defense.

Aoude, 892 F.2d at 1118; see also Transaero, 24 F.3d 457, 460 (2d Cir. 1994) (fraud on the court limited to "that species of fraud which does or attempts to defile the court itself, or ... fraud perpetrated by officers of the court so that the judicial machinery cannot perform in its usual manner its impartial task of adjudging cases"), quoting Kupferman v. Consolidated Research & Mfg. Corp., 459 F.2d 1072, 1078 (2d Cir. 1972); SEC v. ESM Group, Inc., 835 F.2d 270, 273 (11th Cir. 1988) (same), cert. denied, 486 U.S. 1055 (1988); In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 538 F.2d 180, 195 (8th Cir. 1976) ("Antibiotic Antitrust") (fraud on the court defined as "a scheme to interfere with the judicial machinery performing the task of impartial adjudication, as by preventing the opposing party from fairly presenting his case or defense"), cert. denied, 429 U.S. 1040 (1977). "A fraud on the court is justified only by the most egregious misconduct directed to the court itself, such as bribery of a judge or juror or fabrication of evidence by counsel, and must be supported by clear, unequivocal and convincing evidence." Antibiotic Antitrust, 538 F.2d at 195.

18. Indeed, courts have recognized that fraud on the court should be found only under in unusual factual circumstances. See, e.g., Aoude (finding that plaintiff's use of a

bogus purchase agreement as an attachment to complaint, which the court described as exhibiting "corrupt intent", "bad faith", and "gross misbehavior", amounted to a fraud on the court warranting dismissal of the action as a sanction); Antibiotic Antitrust, (allegations of "failure to investigate" certain facts which the Court found was "a serious error in judgment," various misrepresentations of facts, and presentation of legal arguments of questionable basis, taken together did not warrant a finding of civil contempt). Even under Rule 60(b), courts have held that a party must establish more than the failure to disclose potentially relevant information to the Court. See, e.g., Weldon v. United States, 225 F.3d 647, 2001 WL 1134358 (2d Cir. 2000) (text available in Westlaw) (mischaracterization of evidence and affidavits submitted to court "does not rise to the level of fraud on the court"); Oxxford Clothes XX, Inc. v. Expeditors Int'l of Washington, Inc., 127 F.3d 574, 578 (7th Cir. 1997) (mischaracterization of evidence, as distinguished from placing "bogus documents" before the court, does not amount to fraud on the court under Rule 60(b)); SEC v. ESM Group, Inc., 835 F.2d 270, 273 (11th Cir.), cert. denied, 486 U.S. 1055 (1988) (affirming dismissal for failure to state a claim of fraud on the Court under Rule 60(b)(6) based on post-judgment discovery of massive securities fraud and "alleged pervasive fraud" in conduct of trial on a claim of negligence relating to a financial audit).

19. In opposing Defendant's Motion for Judgment on Partial Findings, Plaintiffs suggested that fraud on the court may be established even where there is no intent to defraud and to undermine the judicial machinery. See Rule 52(c) Opp., at 11 ("The general rule is that the integrity to the judicial process or functioning must be undercut, not that there be any specific intent"), citing Greater Boston Television Corp. v. FCC, 463 F.2d 268,

278 (D.C. Cir. 1971), cert. denied, 406 U.S. 950 (1972). However, none of the cases upon which Plaintiffs rely _ or any other cases _ remotely support Plaintiffs' view that a party may be guilty of fraud

on the court without a specific intent to defraud.

20. For instance, Greater Boston Television Corp., the case upon which Plaintiffs purport to place primary reliance, was not a fraud on the court case at all, and barely touched upon the doctrine. Rather, the FCC in that case sought to have the court of appeals recall its mandate for a decision affirming the award of a broadcasting license, where it was later learned that one of the broadcaster's principals had violated securities laws. In the absence of any specific rule of procedure addressing the issue, the court relied upon the common law doctrine that a mandate may be recalled for "good cause," 463 F.2d at 277, and then engaged in a lengthy elaboration of the types of situations that might constitute "good cause." Id., at 277-290. Among the many considerations listed was that of fraud on the court, though there was no allegation in that particular case that there had been such a fraud, and the discussion of this doctrine was very limited. Id., at 278; see also id., at 290 (noting FCC's concession that it "has no information indicating that BBI has compromised the integrity of either the administrative or judicial process by reason of any misrepresentation, secret influence or like matter"). And though Plaintiffs accurately quote from a portion of that opinion describing briefly the "spirit" of the fraud on the court rule, see Rule 52(c) Opp., at 11, they fail to mention the court of appeals' statements that the doctrine is limited to cases where "enforcement of the judgment is 'manifestly unconscionable,'" and that it "does not extend to an omission more fairly characterized as a 'mistake of judgment.'" 463 F.2d at 278 and n.16.

---

21. Plaintiffs' reliance upon Kupferman v.Consolidated Research and Manufacturing Corp., 459 F.2d 1072, 1080-81 (2d Cir. 1972), for the view that no intent to defraud is required, see Rule 52(c) Opp., at 10-11, is equally misplaced. Nowhere in that opinion does the court state or suggest that a "reasonableness" standard applies to the fraud on the court inquiry, as Plaintiffs in this case suggest. In fact, the portion of that opinion cited by Plaintiffs concludes that there was no fraud on the court, in part because the plaintiff's attorney "made no misrepresentations." 459 F.2d at 1081. The court's reference to the fact that the plaintiff's attorney could reasonably have believed that the evidence in question was already known to the defendant does not suggest or imply that an unreasonable belief would constitute fraud. Indeed, the court emphasized (in a portion of the opinion omitted by Plaintiffs) that "it is all too easy to fall into the error of condemning conduct with the aid afforded by the bright glare of hindsight." Id., at 1080. 22. At closing arguments in this case, counsel for Plaintiffs also pointed to a decision by Judge Richey on the fraud on the court issue, suggesting that the standard for fraud on the court in this circuit is in some fashion different from that articulated in Aoude. See Tr. 4647-48, citing Synanon Church, 579 F.Supp. at 974. But the standard articulated by counsel for Plaintiffs, set forth in an opinion by Judge Richey, is not substantively different from the standard set forth above.

"Fraud upon the court" should, we believe, embrace only that species of fraud which does or attempts to, subvert the integrity of the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication, and relief should be denied in the absence of such conduct. Fraud *inter partes*, without more, should not be a fraud upon the court.

Synanon Church, 579 F.Supp. at 974. In fact, Judge Richey in the Synanon Church case found a fraud on the court established because the plaintiff "engaged in a 'deliberately planned and carefully executed scheme to defraud.'" Id. The Court noted the plaintiff's "systematic destruction of tapes and alteration of records" relating to "a corporate policy of terror and violence and the diversion of corporate resources for the enrichment of individuals." Id. Plaintiffs' suggestion in this case that the Synanon Church decision somehow represents a loosened standard of fraud on the court is, plainly, incorrect.

23. Finally, Plaintiffs have argued that civil contempt may be appropriate where a party's conduct amounts to an obstruction of justice. See Rule 52(c) Opp., at 13-18. (See footnote 10) In support of that proposition, they rely primarily upon then-Chief Judge Norma Holloway Johnson's decision in In re Grand Jury Proceedings, 117 F.Supp.2d 6 (D.D.C. 2000) ("Bakaly"). In particular, Plaintiffs note that Judge Johnson initially issued an order to show cause why Mr. Bakaly should not be held in civil contempt for having filed a false declaration. See Rule 52(c) Opp., at 15, citing Bakaly, 117 F.Supp.2d at 13. But Plaintiffs fail to note that there was no legal analysis or discussion in the Bakaly opinion of whether the filing of a false declaration might give rise to civil contempt, and the show cause order was in fact converted to criminal contempt, issued under specific statutory authority.

24. In short, the doctrine of fraud on the court _ which is separate and distinct from the doctrine of civil contempt _ requires a specific intention by the alleged contemnor to set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter. This very high standard has been satisfied only rarely in our judicial system, and for the reasons set forth in Section II below, it is not satisfied here.

II. The Five Specifications of the Court's Orders to Show Cause Should Be Discharged.

A. First and Second Specifications

25. This Court's order addressing the historical accounting is a declaratory judgment. 91 F.Supp.2d 58. Consequently, plaintiffs have failed to show, by clear and convincing evidence that there was a court order, rather than a declaratory judgment, in effect. See Petties v. District of Columbia, 897 F. Supp. 626, 629 (D.D.C. 1995). A declaratory judgment is not an order punishable by contempt when it is not obeyed. E.g., Armstrong v. Executive Office of the President, 1 F.3d 1274, 1289-90 (D.C. Cir. 1993).

26. Nor is the declaratory judgment clear and reasonably specific regarding initiating a historical accounting project. The declaratory judgment does not mention a historical accounting project. Nor does it direct that such a project be initiated. Consequently, the "order" is not clear and unambiguous, as our Court of Appeals requires. E.g., Armstrong, 1 F.3d at 1289. Therefore, as a matter of law, contempt will not lie on the first specification.

27. More importantly, as a matter of law, the record fails to establish by clear and convincing evidence that respondents failed to comply with the declaratory judgment. Petties, 897 F. Supp. at 629.

---

28. The historical accounting project was initiated at least by the creation of the Office of Historical Trust Accounting and that office's publication of plans for the historical accounting _ at a minimum that is "initiat[ing]" a historical accounting project.

29. Of equal importance, work that supports the historical accounting itself has been accomplished. Ernst & Young has completed work on the accounts of the five named Plaintiffs that will be important to the historical accounting. And there has been a successful pilot accounting of a number of judgment fund and per capita accounts, which plaintiffs' own witness reported was a necessary part of a historical accounting project.

30. As to the second specification, as a matter of law, Plaintiffs have failed to establish by clear and convincing evidence that Defendants have committed a fraud on this Court by concealing the Department's true actions. First there has been no showing that Defendants "sentiently set in motion some unconscionable scheme calculated to impair the court's ability fairly and impartially to adjudicate a matter by . . . unfairly hampering the presentation of the opposing party's claim or defense." Aoude v. Mobil Oil Corp., 892 F.2d 1115, 1118-9 (1st Cir. 1989).

31. The record establishes that Defendants' true actions between March 2000 and January 2001 were

presented to this Court. The Federal Register notice was filed with this Court before it was published. Summary judgment motions were filed in March, May, and September, and the decision initially to employ a statistical sampling approach to the historical accounting project, when Secretary Babbitt made the final decision, was filed with this Court. The witnesses agreed that, contrary to the conclusion of the Court Monitor, the decision to use a statistical sampling for the historical accounting project was made August

2, 2000, not predetermined before the Federal Register notice. No witnesses provided contrary evidence. Consequently, Defendants' true actions were made known to this Court.

B. Third Specification

32. The third specification of the Court's November 28, 2001 show cause order charges that DOI committed a fraud on the Court by "failing to disclose the true status of the TAAMS project between September 1999 and December 21, 1999." The thrust of the evidence on this specification has been the fact that DOI in September 1999 prepared _ but did not ultimately file _ a report to the Court addressing some of the delays that had occurred in the TAAMS system development since Trial One.

33. The evidence and legal principles relevant to this specification have been detailed at length above and in DOI's Rule 52(c) motion, which are incorporated by reference and need not be repeated here. In short, the only testimonial evidence presented at trial on this issue showed that DOI in fact made an affirmative decision to disclose information to the Court about the delays in the TAAMS development process. This decision was made at a September 8, 1999 meeting chaired by Chief of Staff Anne Shields, and the evidence shows that no one in attendance at the meeting disagreed. A brief summary of the principal alterations to the TAAMS schedule was prepared by Mr. Nessi, and several later drafts of the document were distributed among DOI officials in the following weeks. There was no trial testimony (and no evidence presented in the Court Monitor's reports) that anyone made any affirmative decision not to make an affirmative disclosure to the Court, and several witnesses explained that they were surprised to learn

later that such a report had not been filed. Where Plaintiffs' principal witness himself speculated that the failure to file the report may have been due to a "bureaucratic bungle," there plainly has been no clear and convincing evidence presented of a unconscionable scheme to undermine the judicial machinery.

34. Plaintiffs are mistaken when they suggest that e-mail correspondence and drafts of a report circulated in the spring of 2000, see Pl. Ex. 62, somehow suggest a fraudulent motive in the failure to disclose additional information about TAAMS in the fall of 1999. The language they rely upon notes that, because the record for Trial One had closed, and the Court had indicated that it would not reopen the Trial record, "the next opportunity to provide this information to the Court was not until the Revised and Updated HLIP was filed on March 1, 2000." Id., at DEF0040882. On its face, this brief statement appears to be a post hoc explanation for the failure to disclose additional information, rather than a statement of DOI's actual reasoning at the time. But more importantly, even if anyone at DOI in fact considered the Court's statement that it would not reopen the record in deciding not to make further disclosures regarding TAAMS, this is far from a fraudulent explanation for DOI's action. In fact, if given any weight at all, it can only be read to suggest a good faith belief that such a disclosure was not required. In combination with the other evidence presented at trial _ which without exception reflected an affirmative decision to disclose this information to the Court _ fraud on the Court simply has not been established.

C. Fourth Specification

35. The fourth specification charges that DOI committed a fraud on the court by filing false and

misleading quarterly status reports starting in March 2000, regarding TAAMS and BIA Data Clean-up. Again, the voluminous evidence relevant to this specification is set forth in great detail above, and need not be repeated here. In short, the evidence does not approach the level of proof needed to establish fraud on the court by clear and convincing evidence.

36. DOI's reporting on TAAMS system and user acceptance testing is perhaps the most significant element of this specification, and the totality of the evidence presented at trial does not support a finding of fraud on the court. On the one hand, Mr. Thompson testified on several occasions that TAAMS "failed" test after test. See, e.g., Thompson 57, 1232, 1238, 1586. And the Court Monitor's review of the documents to which he had access and the witnesses with whom he spoke led him to a similar conclusion that "[n]o adequate description was ever given this Court of the failure by TAAMS to pass the user acceptance and IV&V tests." Pl. Ex. 2, at 124.

37. But the other evidence introduced at trial with respect to this testing painted a very different picture of the results and meaning of these tests. Most notably, as discussed in detail above, both the trial witnesses and the contemporaneous documentation reflected that the November 1999 system test demonstrated that the system software (including the leasing module, as it was originally designed) was functioning well. The IV&V Report of that November 1999 test noted that "[t]he system generally functioned in accordance with the test scripts." Pl. Ex. 2, Tab 7F, at 21. There were only four problem reports generated

during the test, and Ms. McLeod explained that those four reports were all on relatively minor issues. See Pl. Ex. 2, Tab 7F, at 23; McLeod 3034-35. "There were only a couple of minor data conversion problems noted during the test. This was a major improvement over the last testing that took place the week of September 27th." Pl. Ex. 2, Tab 7F, at 21. In fact, Ms. McLeod who was the most knowledgeable trial witness about the system development and testing, testified that this November 1999 system test was successful. See McLeod 3026-29. The evidence presented at trial about the numerous other system and user tests _ discussed at length above _ demonstrated that, although there were plainly very significant delays in the system development process, there remained room for optimism that the system could eventually function and meet the users' needs. When judged against the information that was provided to the Court in the eight quarterly reports _ also discussed at length above _ no fraud on the court has been established.

38. Particularly where the question before the Court is "fraud on the court," a clear distinction must also be maintained between poor management of these two subprojects (which DOI concedes), and inaccurate or fraudulent reporting on them. Illustrative of this vitally important distinction are the observations set forth by the Office of the Special Trustee along with the quarterly reports, which focused almost entirely upon his dissatisfaction with the management of those projects, as opposed to the truthfulness of the reporting on them. For instance, Mr. Slonaker's "Special Trustee Observations" raised the following management issues:

5 * "[T]he progressive, or stepping stone, nature of this project is difficult to track and more detailed benchmarks or milestones are required to hold line managers accountable to the BIA

Chief Information Officer and senior BIA officials." Pl. Ex. 10, at 6.

6 * "The Special Trustee is concerned that enough project managers may not be available within the BIA to be dedicated to the intensive TAAMS project and to sustain its implementation beyond the Rocky Mountain Region." Pl. Ex. 11, at 6.

7 * "[T]he Special Trustee has expressed heightened concern about the project management capabilities assigned to several major HLIP subprojects. Those concerns center on such matters as a lack

of clear strategy, adequate financial and staff planning, communications, and the appropriate direction of subcontractors." Pl. Ex. 12, at 3.

8 * "The Special Trustee continues to have concerns regarding the capability of the BIA project management to implement TAAMS across all twelve regions." Pl. Ex. 12, at 4.

9 * "The Special Trustee continues to be concerned about the progress in the BIA Data Cleanup project. Specifically, the project management is not sufficient for reasons mentioned above. The Special Trustee is also concerned that the contractor is not being provided appropriate direction in the field, and that progress measurement (as mentioned in previous Reports) continues to be deficient." Id.

Prior to the final draft of his Observations for the Seventh Quarterly Report, none of the earlier versions actually raised concerns about reporting on TAAMS or BIA Data Cleanup, as opposed to the overall management and direction of those subprojects.

39. When questioned on this issue at the contempt trial, Mr. Slonaker was even more explicit about the fact that his fundamental concern was with project management. To the extent that he had concerns about the completeness of the reports being submitted to the Court, it was because he did not believe the relevant subproject managers understood the challenges facing them sufficiently well to plan for and report on them:

Q. Your primary concerns about [TAAMS and BIA Data Cleanup] was with management, --
A. Yes.
Q. -- correct?
A. Correct.
Q. And I believe you said that was the primary concern you had with respect to the reporting on --
A. Yes.
Q. -- those projects, --
A. Yes.
Q. -- is management and the fact that, in your view, the people in charge of those projects didn't have as good a sense as you would have liked about the scope of the projects, the difficulties that they were facing, and the difficulties that they were going to face to bring some closure to the project; is that a fair summary of your primary concerns on those reports?

A. That's a pretty good summary. Let me just say it this way: One of the deficiencies of the project management that I saw within the Department on these trust subprojects was the inability to really plan the project properly and understand all the elements of project management that you had to consider and put in place; and so therefore, not only was that a deficiency for the subproject going forward, but they also, in some cases, at least, were not reporting on aspects of the subproject that they really should have considered but never did in the first instance, if you see what I mean.

Q. And so that's really ultimately, I take it from your testimony, a failure of management and of planning in the sense that if they had understood these issues better, planned better for those issues, then the entire project would have been structured around those plans and the reports would have reflected that.

A. Yes. And it's a Departmental problem because the best managers were not put in place in the first instance.

Q. And you gave some testimony, if I recall, about BIA data cleanup and expressed your view that that was -- that there were problems like that with regard to BIA data cleanup. Do you remember that?
A. Yes.
Q. And am I correct that the primary -- your primary concern about BIA data cleanup was the

difficulty of understanding the scope of the project, of understanding what needs to be done with regard to BIA data cleanup. Is that at the heart the most difficult problem with data cleanup?

A. That's pretty much the heart of it. I would just add one thing, and that is the prioritization of tasks that needed to be done so that you got the most important data dealt with initially.

Slonaker 2413-15 (emphasis added).

40. The distinction highlighted by this testimony by Mr. Slonaker _ between failures of project management, on the one hand, and reporting, on the other _ are critical to resolution of the fourth specification. The undeniable fact is that the TAAMS and BIA Data Cleanup projects have not made nearly the progress that DOI officials had hoped and expected at the time of Trial One. And Mr. Slonaker's Observations have, increasingly with each quarterly report, called attention to the core management problems in these projects. The project management failures are in large part attributable to the design of the HLIP itself, which simply did not address all that was critical to effective trust reform. Importantly, the HLIP also served as the framework for reports to this Court. But as explained in great detail above, DOI has disclosed to the Court the most important developments in these two projects. Indeed, the "Observations" sections of the HLIP 2000 contained candid admissions about the delays and problems that had befallen the projects

and frank warnings about the future challenges to them. Though reports certainly were not as expansive as the Court expected, that fact is more attributable to confusion within DOI about the level of detail that was required than any intention to mislead. In short, the serious and undeniable project management difficulties that have plagued TAAMS and BIA Data Cleanup are a far cry from fraud on the court.

D. Fifth Specification

41. Distilled to its essence, the core conclusion of the Special Master's 11/14/01 Report is a simple one _ IT security remains a big problem at the BIA. DOI does not disagree with this core conclusion. See, e.g., 11/28/01 Interior Defendants' Response to Plaintiffs' Renewed Motion for TRO as Amended, at 4 ("Interior Defendants concede that substantial effort continues to be necessary to ensure that the security of its Indian trust- related IT systems is adequate and do not dispute the Special Master's citation to numerous studies that demonstrate the need for additional safeguards."); 11/29/01 Department of the Interior's Response to the Report and Recommendation of the Special Master Regarding the Security of Trust Data at the Department of the Interior, at 1 ("We acknowledge that problems exist with respect to trust data security.").

42. The DOI defendants, however, do disagree with the implication that any fraud was perpetrated on this Court via the contrary suggestion, i.e., that trust data was entirely secure. Indeed, though the plaintiffs have singled out 37 separate DOI representations in their 2/8/02 Submission to this Court, one scans their Submission in vain for any DOI representation that can possibly be read to suggest that all of the Bureau's IT security issues had been successfully resolved. No such false or misleading representation was ever made.

---

43. Consider again the defendants' representations to this Court: From March 2000 forward, the defendants have candidly acknowledged to this Court the generally bleak state of IT security at OIRM. Indeed, the OIRM transfer from Albuquerque to Reston was justified because it constituted a positive, "first step" toward fixing the IT security problems that plagued the Albuquerque OIRM. See 3/20/00 PI Opp. at 9-10. In this regard, defendants' counsel noted that permitting the move to proceed would facilitate, inter alia, the development of IT security plans and OMB A-130 compliance. See Transcript of 3/29/00 Hearing at 25-26. As defendants' counsel was careful to point out, however, the OIRM move to Reston was not to be interpreted as the ultimate panacea. Rather, as was expressly made clear at the PI

hearing, “[OIRM] needs to be moved. It needs to be documented, and that's how we're going to come into compliance with A-130 and all of the other requirements. But it's not going to happen overnight.” Id. at 26 (emphasis added).

44. Later, immediately following the move to Reston, in November of 2000, the defendants touted the successful completion of the OIRM move _ “the relocation was successful and . . . no data was lost during the effort.” See 11/30/00 Progress Report at 6. Once again, however, the defendants sounded a cautious note about the then-present state of IT security: “[A]s of April, 2000, OIRM operations were not in compliance with all required information technology ('IT') security requirements. There is still significant work to be done in this regard.” Id. at 6 (emphasis added). And, it was noted, work was still being conducted to attain A-130 compliance. Specifically, as this Court was told, SeNet had been tasked with (i) creating security plans for specific information technology systems (including the information technology systems utilized by OIRM), (ii) developing updated

policies and procedures, and (iii) developing a security architecture. Id. at 6-7. In sum, the November, 2000 Progress Report concluded, now that the move had been negotiated, “more effort can focus on long-term IT security matters.” Id. at 6.

45. In its April, 2001, Opposition to Special Master Motion, the defendants cited the “effort[s]” that had been focused on IT security matters and the progress that had been made on the IT security front. In this regard, the defendants pointed to the increased physical security offered by the Reston facility. See Opp. to Special Master Motion, at 4-6. Further, the defendants noted that a Bureau-wide Information Technology Security Plan had been developed. Id. at 7. This did not mean, however, that IT security had been achieved. Far from it. As the defendants' Opposition noted, “plans are underway for the protection of applications and support systems.” Id. Such “protection” was obviously necessary, the ITSP made clear, because (i) the Bureau had been subjected to certain attacks, (ii) its intrusion detection system was incomplete and inconsistent, (iii) intruders had been able to compromise certain of the Bureau's systems, and (iv) the Bureau still had an incomplete and noncomprehensive approach to malicious code management. See id. (Declaration of Curran (attaching ITSP)). Once again, however, this Court was informed that these problems would not evaporate “overnight.” Id. (Declaration of John Curran, at ¶ 2). Rather, Curran noted, fully implementing the ITSP would take anywhere from “three to five years.” Id.

46. Thus, when the DOI defendants started down this road in March of 2000, they candidly acknowledged that “[w]e have an unsecure system here.” This was due, the defendants explained, to, inter alia, the lack of security plans and firewalls. As the

defendants continued to travel down the IT security road throughout 2000 and into 2001, they never declared to this Court that the system now was “secure.” To the contrary, though the defendants certainly did note for this Court the progress that was being made via the ongoing efforts to make the system “secure,” (See footnote 11) they also pointed out the deficiencies that still plagued the system. Many of these same IT security deficiencies were chronicled in the Special Master's Report. Thus, for example, as recently as April of 2001, the defendants reiterated to this Court that “intruders” could compromise the system. In like fashion, the Special Master's Report demonstrated that the DOI/BIA Internet infrastructure was vulnerable to outside attack.

47. Nonetheless, despite the many candid DOI representations to this Court chronicled above, in his Report, the Special Master still asks “why was the Court not informed _ via the Quarterly Reports that Indian trust data was virtually unprotected.” As should be apparent from the Defendants' representations outlined above, DOI disagrees with the implicit suggestion of this query, viz., that this Court was never informed of the significant IT issues facing OIRM. This Court was told of the generally bleak state of IT

security on numerous occasions throughout the 2000-2001 time period. As for the Special Master's further question as to why this information was not passed on to this Court via

the Quarterly Reports, the DOI defendants maintain that, for purposes of this Court's 12/6/01 Supplemental Order to Show Cause, all that matters in the context of this contempt proceeding is that this Court was provided with this information.

48. In sum, while it is true, that defendants trumpeted any gains that had been made in IT security over the past two years, by the same token, the defendants never misrepresented the overall state of IT security to this Court. For this reason, this Court must discharge the December 6, 2001 show cause specification. A fraud on this Court was not perpetrated via "false and misleading representations . . . regarding computer security of IIM trust data." Certainly, it cannot be said that the defendants "sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party's claim or defense." Aoude v. Mobil Oil Corp., 892 F.2d at 1118.

III. Even if the Court Concludes that Grounds for Contempt Are Technically Established, the Court Should Exercise Its Discretion Not to Find Contempt.

49. Even were the Court to view the evidence as sufficient to find contempt, it should decline to do so. Courts have discretion not to hold a party in contempt even where the evidence might otherwise warrant. Benavides v. Bureau of Prisons, 993 F. 2d 257, 260 (D.C. Cir. 1993) (district court did not abuse its discretion in denying a contempt citation where BOP had subsequently complied with orders and "therefore, a contempt order is unnecessary to ensure compliance"); Perkinson v. Gilbert/Robinson, Inc., 821 F.2d 686, 689 (D.C. Cir. 1987); SEC v. Bilzerian, 112 F. Supp. 2d 12, 28-29 (D.D.C. 2000) (refusing

to hold defendant in contempt of Court's order for an accounting, despite "harbor[ing] no doubt that [defendant] fully comprehended what he was required to disclose under the terms of the Court's order for an accounting" because "the Court finds that its order may not have been sufficiently 'clear and unambiguous'--as those terms are construed by case law--to support a finding of contempt" and instead entering a "more specific order explicating what information [defendant] must provide to the [plaintiff] and the Court."). See also, Dunn v. New York State Department of Labor, 47 F. 3d 485, 490 (2d Cir. 1995) (Court "took note of Department's new initiatives to improve efficiency"); Russ v. Russ, 187 F. 3d 978, 981 (8th Cir. 1999)(no abuse of discretion to deny contempt even where bankruptcy court made findings of bad faith or intentional non-disclosures); Neely v. City of Grenada, 799 F. 2d 203, 208 (5th Cir. 1986)(court considered progress in compliance and reorganization of city hiring practices); MAC Corporation of America v. Williams Patent Crusher & Pulverizer, 767 F. 2d 882, 885 (Fed. Cir. 1985); In re Grand Jury Subpoena, 926 F. 2d 1423 (5th Cir. 1991); Pittman v. Sullivan, 911 F. 2d 42, 44 (8th Cir. 1990); Balla v. Idaho State Board of Corrections, 869 F. 2d 461, 464 (9th Cir. 1989)(no abuse of discretion in denying contempt where court compared compliance with adopted plan of correction rather than initial order requiring submission of plan); Gifford v. Heckler, 741 F. 2d 263 265 (9th Cir. 1984); Vertex Distributing, Inc. v. Falcon Foam Plastics, Inc., 689 F. 2d 885, 889 (9th Cir. 1982), citing with approval, Washington-Baltimore Newspaper Guild Local 35 v. Washington Post Co., 626 F. 2d 1029, 1031 (D.C. Cir. 1980). Cf. In Re Sealed Case, 250 F. 3d 764, 770 (D.C. Cir. 2001) (plaintiffs made out prima facie case that government prosecutors violated Rule 6(e) but grand jury court decision not to issue show cause order affirmed);

Weinberger v. Romero-Barcelo, 456 U.S. 305, 313 (1982) (a finding of a statutory violation does not automatically require the court to issue an injunction: "The grant of jurisdiction to ensure compliance

with a statute hardly suggests an absolute duty to do so under any and all circumstances, and a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law."). See also, Southern Railway Co. v. Brotherhood of Locomotive Firemen and Enginemen, 337 F.2d 127 (D.C. Cir. 1964) (court's refusal to issue contempt citation upon finding of technical violation of order not an abuse of discretion).

50. Even where a contempt finding may be justified, the court must consider the contemnor's good-faith efforts to comply. Tinsley v. Mitchell, 804 F.2d 1254, 12 (D.C. Cir. 1986); see also NAACP v. Brock, 619 F. Supp. 846, 850 (D.D.C.1985) (". . . a party's inability to comply with a court's orders [may serve as a] defense[] which call[s] for mitigation of contempt sanctions."); Benavides v. Bureau of Prisons, 993 F. 2d 257, 260 (D.C. Cir. 1993); Dunn v. New York State Department of Labor, 47 F. 3d 485, 490 (2d Cir. 1995); Neely v. City of Grenada, 799 F. 2d 203, 208 (5th Cir. 1986).

51. Applying these principles to the circumstances of this case, the Court should decline to hold defendants in civil contempt even if it found the evidence sufficient to do so. Secretary Norton has undertaken substantial efforts to improve the administration of the trust responsibilities imposed upon her by law. Her first formal action, the February 23, 2001 memorandum concerning historical accounting, was issued as a direct consequence of the opinion of the Court of Appeals affirming this Court's December 1999 Opinion and Order. She issued that memorandum specifically to ensure that work did not

slow or stop due either to consideration of further appellate review or to the suspension of other initiatives of the prior Administration. Secretary Norton also sought to underscore the obligation, declared by this Court and affirmed by the Court of Appeals, to account for all funds and not merely those deposited after 1994, as the government had theretofore argued.

52. Moreover, although the February 2001 memorandum mentioned specifically only a statistical sampling for performance of the accounting, it is clear that the accounting effort has come to embrace a wide array of tasks and techniques. OHTA has prepared a blueprint for the accounting and is well underway with the next phase of necessary planning, and from these efforts it is clear that statistical sampling will not comprise the entirety of the accounting project.

53. More fundamentally, the Secretary has proposed a reorganization of the Department's trust functions that, while initially greeted with opposition, is now the subject of constructive dialogue. That proposal reflects the Secretary's commitment, and that of her principal subordinates, to making trust reform a reality.

54. Substantial improvements are likewise discernible in the reporting to this Court. The Eighth Quarterly Report has a fundamentally different organization and content from its predecessors, in that it no longer is focused simply upon HLIP milestones and the breach subprojects. The report contains a good deal of information regarding what is not being done as well as what has been successfully carried out. And like the trust reform effort itself, the Eighth Report exhibits a recognition of the need for greater integration and coordination of the efforts of those in BIA, the Office of Special Trustee, and elsewhere in

the Department who are responsible for the day-to-day work needed to make trust reform a reality.

55. Similarly, problems with information technology security are the subject of intense corrective activity, and are receiving the direct attention of the Department's most senior managers. Department officials are engaged in regular, ongoing contact with the Court's Special Master with respect to all salient aspects of the IT problems.

56. Given all of these considerations, the Court should choose to exercise its discretion not to hold

defendants in contempt even if it concluded that the evidence justified such a finding. Undeniably, a great deal of work remains to be done. But Defendants have made progress toward assuring that the reform efforts underway and the reporting mechanisms in place will lead to real progress in trust reform and the provision of accurate information on what remains to be done.

57. This conclusion is further reinforced by the fact that much of the focus of these contempt proceedings has been on actions, events and statements of government officials that precede Secretary Norton's term in office. The case law is notably scant with respect to the question whether a public official may be held in contempt for acts or omissions of her predecessor in office, though at least one case has so held. Alberti v. Klevenhagen, 610 F. Supp. 138 (S.D. Tex. 1985)(county sheriff in office for five months held in contempt based almost exclusively on his predecessor's failure to comply with an injunction, court stating that "the inevitable succession of officials in public office does not excuse noncompliance"). The Court in Alberti relied upon Fed. R. Civ. P. 25(d)(1) and cases in which courts had reached the unremarkable conclusion that "a substituted party steps into the same position

of the original party." 610 F. Supp. at 141- 42, quoting Ranson v. Brennan, 437 F.2d 513, 516 (5th Cir.), cert. denied, 403 U.S. 904 (1971)) and citing Newman v. Graddick, 740 F.2d 1513, 1517-18 (11th Cir. 1984).

58. The injunction that was violated in Alberti had continuing force, and imposed continuing obligations, through the tenure of both the previous sheriff and the incumbent. In the present action, by contrast, that thread of continuity is altogether lacking with respect to two of the five specifications (the second and third), which are facially limited to time frames preceding the current Defendants' tenure in office. Regarding the first specification, even assuming, arguendo, that the previous administration failed to initiate an accounting, it is clear that this administration has instituted an accounting through the establishment of OHTA. And the allegations of fraud on the court, by their nature, focus upon discrete statement or reports, rather than continuing action or failure to act.

59. It can hardly be gainsaid, moreover, that the decision in Alberti, involving as it did a county sheriff, stands at a distant jurisprudential remove from the situation presented in this case, where a Cabinet member has taken office after many of the events at issue have already occurred. In this regard, it is significant that no reported decision has held a Cabinet officer in contempt for acts or omissions of a predecessor.

60. Any time a request is made by a party in civil litigation to have a Cabinet officer held in contempt, considerations of interbranch comity arise. See, e.g., In Re Attorney General, 596 F.2d 58, 64 (2d Cir. 1979), cert. denied, 444 U.S. 903 (1979):

Although we unequivocally affirm the principle that no person is above the law, . . . we cannot ignore the fact that a contempt sanction imposed on the Attorney General in his official capacity has greater public importance, with separation of

powers overtones, and warrants more sensitive judicial scrutiny than such a sanction imposed on an ordinary litigant.

Mindful of these concerns, the Second Circuit concluded that "holding the Attorney General of the United States in contempt to ensure compliance with a court order should be a last resort, to be undertaken only after all other means to achieve the ends legitimately sought by the court have been exhausted." Id. at 65. (See footnote 12)

61. These considerations take on enhanced significance when the cause of action is grounded, as it is here, on the Administrative Procedure Act. Indeed, in another context, this Court has in this very case

acknowledged the primacy accorded by the law to defendants as Executive Branch officers with respect to the design of measures to carry out their trust responsibilities:

The Court will . . . remand the administrative record to the Department of the Interior and the Department of the Treasury

for further proceedings not inconsistent with this Memorandum Opinion . . . . Moreover, the court will not be unduly intruding into the role of the Executive branch.

91 F. Supp. 2d at 54-55; see also Cobell, 240 F.3d at 1109 (approving of Court's decision to remand for further action by Department) . This is not to say that the Secretary is beyond the reach of orders of the Court, for she is not. Rather, it is to say that in cases that span more than one Presidential administration, judicial concerns regarding compliance with orders and discharge of statutory obligations are properly informed by consideration of the time frame in which the salient events took place.

62. Given the fundamentally coercive purpose of civil contempt, Food Lion, 103 F.3d at 1016, its utility is at best extremely limited when those responsible for the purportedly contumacious acts or omissions no longer hold office. (See footnote 13) The incumbent Secretary simply cannot redirect the conduct of those who preceded her in office, nor can she fairly be deemed responsible for that conduct in any respondeat superior sense. In the context of the present case, thus, plainly she cannot change what occurred prior to January 31, 2001 with respect to historical accounting, the status of TAAMS, other aspects of trust reform or reports to the Court on any of these.

63. Moreover, a substantial period of time has passed during which important subordinate posts went unfilled. Deputy Secretary Griles notes that at the time he assumed

office, only three other Presidential appointees were in place. This dearth of managers exacerbated the disruption and delay that inevitably accompanies transitions in Presidential administrations even in the best of circumstances, and that occurs even with regard to executive functions that are running smoothly at the time of the transition. Here, of course, the problems in Indian trust administration had become well entrenched long before the current Secretary and her staff assumed responsibility for them.

64. The EDS reports and other observers have emphasized the critical impact that a lack of strong, centralized leadership had on trust reform efforts, a problem that existed for a long time prior to Secretary Norton's taking office. Her ability to gain insights into the sources and dimensions of the problems plaguing trust administration, and to design and implement effective solutions, were inevitably constrained by the near-complete absence of subordinate appointees to whom she could turn for information and advice. Now that the Secretary's full management team is in place, reform efforts are moving forward at an appreciably better pace. A fundamental redesign of those efforts is already underway, as is a new and more comprehensive approach to reporting to this Court.

65. The Court is obliged to consider the prospective impact of a contempt finding upon the Secretary's ability to carry out the very reforms that all parties agree are essential to effective trust administration. Given the constitutional constraints on the appointment of a receiver, even if contempt were warranted on the evidence it is the Secretary and her subordinate officers that must go forward with the trust reform effort.

66. It is the Secretary who must obtain funds from Congress; who must engage Congress, the Tribes and other interested parties in constructive dialogue on the

reorganization of trust management; who must spearhead the effort to attract qualified staff to the Department; and who, ultimately, must provide leadership to those already engaged in vital trust reform efforts. All of these undertakings will go forward in an environment in which interested parties and

institutions have exhibited varying and sometimes sharply conflicting perspectives, and in such an environment the mediating role of the Secretary becomes all the more indispensable. All of these functions would inevitably be compromised severely by a contempt finding.

67. Thus, the Court plainly has the discretion to stay its hand even if it were to conclude that the evidence supported a contempt finding. The case law makes that much clear. It is substantially less clear, however, that the federal courts are firmly resolved on the application of Rule 25(d)(1) to a contempt proceeding. Given the extent to which the evidence at trial focused upon the acts of Secretary Norton's predecessor and his subordinate officers, and given further the substantial efforts already undertaken by her,

the Court should conclude that no contempt finding is warranted.

Respectfully submitted,

_____
ROSCOE C. HOWARD, JR.
D.C. Bar No. 246470
United States Attorney

_____
MARK E. NAGLE
D.C. Bar No. 416364
Assistant United States Attorney

_____
R. CRAIG LAWRENCE
D.C. Bar No. 171538
Assistant United States Attorney

_____
SCOTT S. HARRIS
D.C. Bar No. 449037
Assistant United States Attorney
555 Fourth Street, N.W.
Washington, D.C. 20001
(202) 307-0338

Footnote: 1 *In these Proposed Findings of Fact and Conclusions of Law, testimony from the recent contempt trial will be cited by reference to the witness's name, followed by the page number of the transcript, i.e., "Thompson 3288."*

Footnote: 2 *Mr. Lamb noted that the term historical accounting and statistical sampling were ill-defined and used very loosely, often interchangeably, during this period. Lamb 2738-2739. See also Thompson 270.*

Footnote: 3 *Defendants are aware that Plaintiffs' Exhibit 29, a letter from Gene L. Dodaro, Principal Assistant Comptroller General, to John Berry, Assistant Secretary of Interior for Policy,*

Management and Budget dated August 27, 1999 has been identified at several points in the trial. That letter states:

> *. . .In response to questions, we have explained that our records do not establish that GAO conducted a "final" GAO comprehensive audit of IIM accounts, nor do they establish any regular practice of auditing IIM accounts.*

The statement that GAO records "do not establish that GAO conducted a 'final' GAO comprehensive audit of IIM accounts" does not appear relevant to the argument in Defendants' September 19 motion. Defendants did not argue that GAO had conducted a "final GAO comprehensive audit of IIM accounts," or that GAO had a "regular practice of auditing IIM accounts." Instead, Defendants argued that certain statutes in effect prior to 1951 defined their accounting duty concerning IIM transactions handled by Indian Disbursing Agents, and that, as a matter of fact (and factual material was submitted in support of the motion), the statutory requirements had been met.

Footnote: 4 *Per capita accounts are created for minors and adults who are ineligible to receive direct payment of tribal per capita distributions.*

Footnote: 5 *Defendants are aware of this Court's concern regarding the motion for leave to submit the report to Congress. It should be noted that Defendants made an unsuccessful effort to modify the motion to request permission to submit a redacted version. See Tr. 3543.*

Footnote: 6 *The final version of the HLIP 2000 contained a much more detailed discussion of the IV&V report than was proposed by Mr. White in the e-mail attached as Tab 8B to Plaintiffs' Exhibit 2. See Pl. Ex. 6, at 78-79.*

Footnote: 7 *"The primary purpose of the Muliple Owner Identification Task is to determine the correct identification number of several individuals identified as anomalies in the BIA Land Record Information System and Integrated Record Management System. The individuals on these anomaly lists have land interests in these systems under more than one ID number. Once the correct number is determined, personnel update the systems to coincide with hard-copy land title documents and records." Pl. Ex. 10, at 67-68.*

Footnote: 8 *At several points in their "Submission of Information Technology Security Representations Regarding Count Five of This Court's Order to Show Cause" (hereafter "2/8/02 Submission"), the plaintiffs quote from representations that were made about the existence of a "BIA Security Operations Plan." See, e.g., 2/8/02 Submission at 2-4 & 5 (quoting government counsel at 3/29/00 Hearing: "'there is a security plan'"). As was expressly made clear to this Court, the "BIA Security Operations Plan" was a plan for data protection during the course of the move from Albuquerque to Reston. Thus, it was "'specifically designed to provide a protocol for the datacenter relocation and the maintenance and support of the current BIA applications and operations environment.'" Id. at 3 (quoting PI Opp. at 13); see also id. at 5 ("'that's the basic security plan for the move itself'" (quoting Transcript of 3/29/00 Hearing at 27)). This "BIA Security Operations Plan," then, is to be distinguished from the "operational security plans" required by OMB Circular A-130. As Defendants freely conceded in their 3/22/00 Correction to Defendants' Opposition to Motion for Preliminary Injunction and Motion for Emergency Hearing, the latter security plans still needed to be "develop[ed]." Id. at 4; see also Transcript of 3/29/00 Hearing at 24 (government counsel: "The*

documentation that is a prerequisite if you're going to have a security plan. I mean, my goodness, how can you not have a security plan?").

Footnote: 9 *Deputy Secretary Griles testified that the Department's budget for Fiscal Year 2003, as submitted to the Congress, sought an increase in overall funding of trust functions of $87.5 million. Griles 4946. Secretary Norton testified that the precise figure was $83.6 million. Norton 4392.*

Footnote: 10 *Of course, the second through fifth specifications of the Court's show cause orders have not framed the charges against DOI as an alleged obstruction of justice, but instead as an alleged fraud on the court. But even if the charges had been framed in this manner, for the same reasons that DOI's actions do not constitute a fraud on the court, they also do not amount to an obstruction of justice. For these reasons, DOI addresses Plaintiffs' legal arguments concerning alleged obstruction of justice only briefly.*

Footnote: 11 *The DOI defendants do not mean to suggest otherwise. Indeed, as the plaintiffs have chronicled in some detail in their 2/8/02 Submission, the defendants often cited the IT security "improvements" that had been instituted. See, e.g., 2/8/02 Submission at 5 ("'steps to improve security'"); id. at 6 ("'numerous steps to improve the security of the Reston facility'"); id. at 7 ("'move has also fostered security improvements'"). However, it is also important to note that nothing in the Special Master's Report contradicts these touted improvements. Rather, the Special Master's Report focuses on the IT work still to be done, not the work that has been accomplished.*

Footnote: 12 *The Court of Appeals for this Circuit cited In Re Attorney General with disapproval in In Re Kessler, 100 F.3d 1015, 1017 (D.C. Cir. 1997). But the basic proposition for which In Re Attorney General was cited, and not followed, related to the availability of mandamus for review of a discovery order. 100 F.3d at 1017. Relying on Attorney General, the government had argued that mandamus was available to challenge an order requiring discovery in the form of a deposition of the head of the FDA. Contempt had been found in Attorney General, but not in Kessler. And although the Court in Kessler remarked that "[c]ontempt orders have been levied against executive branch officials and agencies without even so much as a hint that such orders offend separation of powers," id., the cases cited, Armstrong v. Executive Office of the President, 821 F. Supp. 761 (D.D.C.), rev'd, 1 F.3d 1274, 1289 (D.C. Cir. 1993)(per curiam), and Sierra Club v. Ruckelshaus, 602 F. Supp. 892, 903 (N.D. Cal.), did not involve contempt sanctions against a Cabinet officer for acts of a predecessor. In Armstrong, the District Court's orders had issued on January 6 and 11, 1993 and the contempt was entered on May 21, 1993. In the intervening period there was a change in Administration but the initial orders were not directed against Cabinet officers (or, for that matter, the President himself) and the contempt was in any event reversed by the Circuit. In Sierra Club, the Court's order issued on July 27, 1984 and the contempt was entered on December 11, 1984, all during the tenure of the same EPA Administrator.*

Footnote: 13 *Insofar as civil contempt also has a compensatory purpose, Food Lion, id., plaintiffs would not need a contempt finding to seek or to recover attorneys' fees. For purposes relevant to this case, the United States' waiver of sovereign immunity for attorneys' fees and expenses is reflected in the Equal Access to Justice Act, 28 U.S.C. § 2412. Plaintiffs' entitlement vel non to fees can and should be determined in accordance with the provisions of that statute, and contempt is not a prerequisite to recovery of fees under its terms.*

Converted by Andrew Scriven