

**TESTIMONY ON
AMERICAN INDIAN TRUST MANAGEMENT PRACTICES IN THE
DEPARTMENT OF THE INTERIOR**

MARCH 3, 1999

**JOINTLY BEFORE THE SENATE COMMITTEE ON INDIAN AFFAIRS AND THE
SENATE ENERGY AND NATURAL RESOURCES COMMITTEE**

**SUBMITTED BY THE INTERTRIBAL MONITORING ASSOCIATION
ON INDIAN TRUST FUNDS**

Mr. Chairmen and members of the Committees, I am Chief Charles Tillman of the Osage Nation of Oklahoma. I serve on the Board of Directors of the Intertribal Monitoring Association on Indian Trust Funds (ITMA), a consortium of 39 federally recognized tribes on whose behalf I present testimony today. Please accept the gratitude of the tribes for giving us the opportunity to address these distinguished committees regarding ITMA's views on the management practices of Indian trust funds and assets by the Department of the Interior.

ITMA was deeply involved in Congress' development of the 1994 Indian Trust Fund Management Reform Act. Since that time, on behalf of tribes, ITMA has continued its involvement by monitoring and working closely with the Office of Special Trustee to ensure progress with the reforms of the Interior Department's trust funds and trust asset systems, as has the Special Trustee's Advisory Board.

The behavior of the Interior and Justice Departments over the past few months has been outrageous. They have lied to a Federal judge, been found in contempt of court, engaged in a cover-up, issued a Secretarial Order that violates federal law, and forced the resignation of the Special Trustee, the only person in the history of the Department that has recognized that "trust responsibility" is not a buzzword but a set of rigorous legal standards the Department must comply with. These actions are consistent with the Department's behavior over the past six years, as outlined in our

Chronology of Secretarial Actions on Indian Trust Issues (Attachment A to this testimony). However, other witnesses will be focusing on this outrageous behavior. In response to the Committees' request and because of our desire to see this problem solved once and for all, our testimony focuses on the underlying problem and sets out a series of very specific recommendations for solving the underlying problem. Most of our recommendations will require legislation.

Below is a Summary of ITMA's Position and Recommendations. The body of our testimony expands on these points:

The underlying problem is that the Interior Department is the only trust department in the country that is unregulated -- and it shows. Every bank trust department is rigorously examined by state or federal bank regulators to insure they are complying with trust standards. The Trust Fund Reform Act sought to instill a trust environment, but it assumed that the Secretary would rely on his expert Special Trustee when making trust decisions, rather than on career bureaucrats and political appointees who have no expertise in trust management. This assumption has proven false.

To correct this problem ITMA recommends that Congress enact legislation that does the following:

- While management of trust assets would remain in the BIA, the Office of Special Trustee (OST) be transferred to one of the Federal bank regulatory agencies, from which it will oversee the trust reform effort at Interior, examine the Interior Department's management of the trust, and be empowered to impose penalties for violations, just as EPA can do to federal agencies that violate environmental laws.
- As soon as he deems it practical, the Special Trustee, in his new agency, shall arrange for the management of the investing of the \$3 billion in Indian trust funds to be contracted out to banks owned by Indian tribes so the trust funds are working in the Indian community as well as earning interest for the beneficiaries. The Special Trustee would regularly examine these banks to insure the funds are managed according to trust standards. This contracting out would not in any way diminish the United States' trust responsibility:

- As soon as the trust fund management systems are fully reformed, management of the Office of Trust Fund Management (OTFM) accounting functions should be contracted to one or more tribally-owned banks, but to the extent possible, the banks should retain the excellent and highly motivated OTFM staff that has been developed under Mr. Homan's supervision.
- The OST would operate a special program to assist tribes that wish to assume administration of the trust asset functions pursuant to the Self Determination and Self-Governance Acts:
- It will take months at best to get such legislation enacted and implemented. During this period, we cannot afford to let the present
- Unqualified officials oversee the trust reform, particularly with the President's request for \$90 million for reform efforts in FY 2000.
- ITMA therefore requests that the Committees write to the judge in the Cobell v. Babbitt case and ask that he appoint a Special Master to oversee trust fund reform until Congress can adopt new legislation.

A. THE UNDERLYING PROBLEM

Two recent events have crystallized a long-festering problem. First, a Federal District Court judge in *Cobell v. Babbitt* issued a 76 page ruling holding the Secretaries of Interior and Treasury in contempt of court. The reason for the contempt order was that Justice Department attorneys failed to produce the documents they were required to produce in that case and then, along with Interior Department officials, lied to the Federal judge and engaged in other improper actions to try to cover up the problem. A copy of the key part of the Judge's decision, (the summary and conclusion section,) is provided at Attachment B of this testimony. We urge every member of the Committee to read it. As we know from another recent event in the Senate, lying in a judicial proceeding and trying to cover it up are serious matters. Here high-ranking government officials engaged in such behavior to try to defeat the rights of 300,000 poor Indian people.

The second outrageous event was that Secretary Babbitt issued Secretarial Order 3208, reorganizing the Office of Special Trustee. From reading the judge's decision, it appears that the Secretarial Order was a thinly veiled attempt to improperly

push the blame for the failure to produce the documents on the Special Trustee and his staff. But in addition, the Secretarial order is in direct conflict with the intent and legal authorities of the Trust Fund Reform Act. It also forced the resignation of the Special Trustee, the only Interior official who understood that trust responsibility is not a buzz word but a set of stringent legal obligations the Department must follow.

The Federal judge described these actions as follows: "I have never seen more egregious misconduct by the federal government." Unfortunately, the only reason he has not seen such egregious behavior before is that he has had no previous involvement in the Interior Department's mismanagement of Indian trust funds and resources. The 1992 Synar Report "Misplaced Trust" and numerous other studies going back 150 years document similar cases of egregious behavior by our "trustee". These recent events, while extraordinary in their own right, are just one more chapter in the voluminous story of the longest running and most serious breach of trust in history.

In our view, the underlying problem, to paraphrase a recent airline commercial, is that the Interior Department is the only trust department in the country that is unregulated -- and it shows. An unregulated trustee is an invitation to abuse and misconduct, which is generally followed by the kinds of cover-up and lying we have seen in the contempt proceeding. Every bank trust department is subject to a comprehensive and rigid set of standards that are established by regulation and case law and that set out what that trustee must do, when it must do it and the qualifications of the people who must do it. The trustee is regularly examined by state or federal regulators who go over its compliance with those standards with a fine tooth comb. A trustee who fails to comply with those standards is subject to fines and prison terms.

Further, if the trustee grossly violates those standards, the regulators have the authority to appoint a receiver to come in and clean up the problem. That receiver does not go in as a team player to work in a consultive manner with the managers who created the mess in the first place. Rather, the receiver goes in with a big club and uses it to force the reforms needed to bring that trustee back into compliance with those standards.

There is a simple reason why the law has established such strict standards and strong enforcement mechanisms when dealing with trust departments. It is because those trust departments are managing other peoples' money. It is not the trustee's money, it is not money provided by investors looking for business opportunities. It is other peoples' money that the trustee has been "trusted" with to take care of and account for rigorously. In the case of the Interior Department trust, it is not the Government's money; it is money that belongs to 200 tribes and 300,000 individual Indians

One of the bank regulators's responsibility is to review the candidates for the CEO and other high level positions at a bank or bank trust department. They would never allow someone with no expertise in trust management to be hired to reform a large trust department that had been grossly mismanaged. Yet Secretary Babbitt's January 5, 1999 Secretarial Order placed Tommie Thompson in charge of the day-to-day management of trust reform in the Department. Assistant Secretary Gover appointed Dom Nessi to be in charge of trust asset reform in the BIA. Both of them are good and decent persons, but they are career bureaucrats. Between the two of them, they do not have a single day's experience managing or reforming a trust department. In fact, with Mr. Homan's resignation, there is not a single person in the chain of command on trust reform in the entire Department of the Interior who has a single day of experience running trust systems.

Secretary Babbitt would not want Tommie Thompson as the CEO of the bank he keeps his money in, and he does not have to worry about that, because the bank regulators would never let it happen. But Secretary Babbitt concluded that they were good enough for Indians, and there was no regulatory body to step in and stop him from breaching his trust responsibility. Another example is that the Secretary approved the High Level Implementation Plan for cleaning up the trust asset mismanagement at the BIA, even though the Special Trustee told him that the Plan would not bring the BIA into compliance with trust standards. The Secretary apparently did this because bureaucratic concerns within his Department took priority over trust standards. Again, there was no outside regulatory body to compel him to comply with trust standards.

Unfortunately, the 200 Indian tribes and 300,000 Indian people who have the Interior Department as their trustee are solely dependent upon the good will and good judgement of the Secretary. As a result, they have ended up with a trustee who does not comply with the set of legal obligations that constitute “trust responsibility” and is able to get away with it.

The 1994 Indian Trust Fund Management Reform Act tried to provide some of the same protections to the Indian and tribal trust beneficiaries that the bank regulatory agencies provide to all other trust beneficiaries. The Act reinforced the court decisions holding that the trust is subject to the same basic trust standards as private trusts. It created the position of Special Trustee and required that the incumbent be a person with qualifications and experience in trust management and the reformation of grossly mismanaged trust departments. Mr. Homan was the perfect person to serve as Special Trustee. He had extensive experience cleaning up troubled financial institutions, both as a regulator within the OCC and as someone brought in by management to clean up financial institutions that were in trouble, such as Continental Illinois. For the first time, there was an official in Interior who was expert in trust management and understood the extensive legal obligations that go with being a trustee.

However, in order to avoid a threatened veto, a weak spot in the Trust Fund Reform Act was that it did not give the Special Trustee the club to compel reform, as would be the case with a receiver appointed to clean up a private institution. Nor did it place the trustee outside the Department so he would be in the same capacity as a bank regulator overseeing a national bank. Instead, the club was put in the hands of the Secretary. The Act provided that Special Trustee was to report directly to the Secretary in order to insure that bureaucrats or political appointees with no trust expertise did not filter the recommendations the Special Trustee gave to the Secretary. But ultimately, it was recognized from the beginning that the success of the Act would be dependent on the willingness of the Secretary to understand the unique nature of the strict legal requirements that are at the core of trusteeship, to accept the advice of his trust expert, and to withstand the pressures from his other officials to make decisions that were not in compliance with trust standards. It all depended on the

Secretary since there was no entity with legal authority over him to make him act appropriately.

Unfortunately, the Act aimed too high. Secretary Babbitt, who opposed the Act when it was being considered by Congress, has consistently placed bureaucratic and political considerations over trust standards. The Secretarial Order was simply the latest of such actions. The problem comes down to the difficulty a trust program with specific and strict legal requirements has fitting into an agency that runs governmental programs and that lacks the trust “culture” that exists in regulatory agencies and regulated financial institutions.

As indicated above, the individual coming into clean up a mismanaged trust department cannot be and never is a team player, particularly when many of these other players were the people responsible for creating or perpetuating the mess in the first place. In the Interior Department, being a team player and having “get-along, go-along” attitude has turned out to be more important than fixing the trust problems. As has been the case when reform has been attempted in the past, the Departmental officials surrounded Mr. Homan, pounded him, and eventually were able to drive him out of office. We do not believe this will ever change. The Department has indicated it will try to fill the Special Trustee position. But it is unlikely any qualified person with respect for the legal obligations of a trustee will apply, knowing that the Secretary is ready to cut the Special Trustee off at the knees whenever it suits the Secretary’s other objectives. And even if a highly qualified person takes the job, he or she will be subject to the same barriers that prevented Mr. Homan from succeeding.

In sum, because there is no outside regulatory body to compel the Secretary to comply with these trust standards, the Reform Act, while making a significant start in cleaning up the gross mismanagement, has failed and will continue to fail unless it is dramatically revised. The Department will never have a trust “culture”. It therefore must be imposed from outside because both the Indian people and the American taxpayers have suffered enough. The taxpayers of this country have already incurred what is likely to total billions of dollars in liability because of the Interior Department’s

past mismanagement of Indian trust funds and assets. And this liability continues to mount every day that Secretary Babbitt refuses to meet his legal obligations as trustee.

B. RECOMMENDATIONS

For these reasons, it is ITMA's view that Congress needs to take two specific actions, one providing a short-term solution and one the long-term. The long-term solution involves amending the Reform Act to place responsibility and authority for overseeing the reform effort in a regulatory body, outside the Interior Department, that understands the concept of legal trust responsibility. However, that will take months, if not several years, to enact and implement. During that period, without a Special Trustee, we believe that many of the reforms Mr. Homan was able to accomplish are in danger of being undone, while the programs the Department will implement in the future, without having anyone with trust expertise to guide it, will not be properly implemented. This becomes a very serious and immediate issue because the President has proposed that Congress appropriate \$90 million for trust reform in FY 2000. We desperately want that money appropriated, but we do not want it improperly spent once appropriated because, if it is, we are unlikely to get a second chance. Without trust expertise in the Department, we are skeptical that the money will be well spent.

While Congress is unable to act quickly in this situation, the courts can. For that reason, ITMA asks that as the short-term solution, the Committees write to the judge in the trust fund lawsuit, Cobell v. Babbitt, and ask that a special master or receiver be given the authority to oversee the trust reform effort until Congress is able to enact remedial legislation. The Judge has already appointed a special master to oversee the document production in the case. A communication to the judge from the cognizant legislating committees, asking that he expand the authority of that special master to include oversight of the entire reform effort at Interior until Congress can enact a permanent fix, should be extremely persuasive in encouraging the court to take that action and to take it soon.

The long term solution consists of amending the Reform Act. Those amendments need to be guided by two basic principles: 1) the need to have an outside regulator oversee the Department's trust reform and trust management efforts; and 2) the need for the Indian tribes themselves to play a larger role in the trust management area. At this point, we only have the broad outline of such amendments and even that have only initially been presented to the tribes that are members of ITMA and the rest of Indian country. We request that the Committees ask their staff to work with us over the coming 60 days to flesh out this outline. During the same time period, we will be taking these ideas out to the tribes for their review and comment. Our goal is to have proposed legislation, that has the support of Indian country, ready for introduction by early May. Our hope is that it can be enacted before Congress adjourns in the Fall.

The broad components of our recommended amendments consist of the following:

- The trust responsibility of the United States must remain unaltered;
- Trust asset management should remain in the BIA because tribes have expressed concern about the effects of removing it from there. However, tribes that wish to should be assisted in assuming management of their assets and funds under the Self determination and Self Governance acts;
- The Office of Special Trustee (OST) should be transferred from Interior to one of the Federal bank regulatory agency. From that location, it will oversee reform of the trust fund and trust asset systems at Interior and then continue to examine those systems once they are reformed to insure they stay in compliance with trust standards. There is ample precedent for one Federal agency overseeing another. For example, EPA regulates environmental compliance at DOD installations and has the authority to impose fines and other sanctions on the commander of a DOD installation that violates the environmental laws;
- The Office of Special Trustee, as soon as responsibly possible, would transfer responsibility for investing the \$3 billion in Indian trust funds should be contracted to the trust departments of tribally-owned financial institutions that are regulated by a governmental agency. The funds will retain their trust status but they will be better managed, the money will be working in Indian country, and the banks will be able to offer tribes the same range of investment options available to any trust beneficiary, a much wider range than

OTFM can now offer. The Special Trustee would examine those banks to insure they comply with trust standards;

- Once the management of Indian trust funds is fully reformed, the Office of Special Trustee would contract all of the accounting functions now carried out by the Office of Trust Funds Management to tribally-owned financial institutions, which will be overseen and examined by the OST. To the extent possible, the banks should retain the excellent and highly motivated OTFM staff that has been developed under Mr. Homan's supervision. Again, there would be no diminishment of the United State's trust responsibility;
- The OST would have a special program to assist tribes that wish to assume administration of the trust asset functions on their reservations, pursuant to the Self Determination and Self-Governance Acts.

That represents a general outline of our proposal to reform the Reform Act. We recognize it is just a starting point and it will change significantly as it is subjected to greater scrutiny by Indian country and Congress. However, we believe that the two basic underlying principles are valid and should guide any reform effort -- the need for an outside regulator and the need to maximize Indian self-determination.

We have one final point. The contempt order against the United States in Cobell v. Babbitt is not the first time the Government has been cited for contempt or other improper efforts to delay trust fund litigation. To the contrary, it appears to be part of a larger pattern. For example, in a case brought by a group of Navajo allottee, Mescal et. al. v. U.S., a case that had dragged on for over ten years, the Federal District Court for New Mexico found the Justice Department and the specific attorney handling the case to both be in contempt of court for using improper tactics to delay that case. Calling the attorney's behavior "uncooperative and obstructive," the court imposed a fine of \$35,000 as part of its contempt order. No disciplinary actions were taken against that attorney and she continues to handle Indian trust cases today.

In Assiniboine and Sioux Tribes v. U.S., the Justice Department managed to again delay a trust fund mismanagement case (this time in the Court of Federal Claims)

for over ten years. This judge also expressed his extreme frustration at the Government's foot-dragging in the case and took action against the attorney handling that case as well. In another Court of Federal claims trust suit, Oglala Sioux Tribe v. U.S., the court described a Justice Department argument in the following terms; "Such an assertion, we find, is shocking, insofar as it is a gross misstatement of the law."

It would appear that there is a pattern here -- an effort by the United States to discourage breach of trust suits by using improper tactics to delay them until the plaintiffs run out of resources. While there may be other explanations, there clearly is sufficient circumstantial evidence here to justify a Congressional oversight hearing on the Government's behavior in breach of trust law suits. We hope the Committees will hold one in the near future.

Finally, ITMA would like to use this opportunity to publicly express our appreciation to Paul Homan for his professional, selfless and dedicated work on behalf of Indian trust reform. We know it was not easy for him to work in the hostile environment he faced within the Interior Department. But despite those obstacles, he was able to accomplish more for Indian trust reform in four years than everyone else combined was able to do in 180 years. He brought OTFM into compliance with trust standards so that it can now account for every penny that comes in. He raised the morale at OTFM so that, for the first time, people were proud to work there, you raised the level of competency at OTFM, with 98% of the work force being Indian. And finally, he refused to compromise trust standards or the interests of the Indian people. For all of these reasons, we will miss him, but wish him the best in his new endeavors.

In conclusion, we again express our appreciation to the Committees for holding this hearing. We look forward to working with you in the coming months to finally solve this 180-year-old problem.

ATTACHMENT A

CHRONOLOGY OF SECRETARY BABBITT'S ACTIONS ON TRUST REFORM

1. January 1993. During his confirmation hearing, Secretary Babbitt said he would have a plan ready for reforming the trust problem in 60 days after he took office.
2. February 1993. Congressman Synar introduced the Indian Trust Management Reform Act bill in the House of Representatives. Senator Inouye and others introduced a companion bill in the Senate.
3. March 1 993. Secretary Babbitt told Congress that he would have his comments on the Synar Bill to them shortly. He never provided any comments, despite repeated urging by various Senators and Congressmen. As a result, Congress waited a year without acting on the legislation, in expectation of those comments.
4. June 1 994. Secretary Babbitt told Congress he would submit an alternative to the Synar bill. No such bill was ever submitted
5. Summer of 1 994. Secretary Babbitt's immediate staff testify against the Synar bill at various Congressional hearings. In particular, they oppose the title in the Act creating the Special Trustee, arguing that it would just create an additional layer of bureaucracy in the Department.
6. October 1 994. A bipartisan group of Congressmen and Senators move the Synar through Congress despite the vigorous personal lobbying by Secretary Babbitt against the bill. President Clinton signs the bill into law.
7. 1995. Despite the fact that it is the tribes' money, Secretary Babbitt denies the tribes any role in the selection of the Special Trustee. Despite this, the tribes submit Paul Homan's resume to the Department. Secretary Babbitt recommends the appointment of Homan to the President who sends his name to the Senate for

confirmation. The Senate confirms and Homan is sworn in as Special Trustee in September of 1995.

8. September 1995-July 1997. Homan is ostracized by the Department officials. Secretary Babbitt creates the 'Homan containment committee' of top staff. Homan completes Strategic Plan for reforming the trust systems. Secretary Babbitt refuses to accept it and prohibits Homan from proceeding with any reform activities, freezing funds appropriated by Congress for that purpose.

9. June 1996. Individual Indian account holders file class action suit against Secretary Babbitt and others, (Cobell et. al. v. Babbitt et. al.) largely out of frustration at the Department's continued stonewalling of reform activities.

10. July 1997. The Senate Indian Affairs Committee holds a hearing on the status of the Strategic Plan. The Interior Department witness devotes his testimony to criticizing the Plan without offering any alternative. At the hearing and subsequently, Senators inform the Department that Congress will no longer tolerate the negativism and stonewalling. It must either come up with its own positive plan for reforming the trust systems or accept Homan's plan. Further delay will not be tolerated.

11. August 1997. Three weeks after that hearing, Secretary Babbitt issues a memorandum informing the Department that he and Homan have reached agreement on moving forward on certain components of the Strategic Plan and urging the other Departmental officials to give Homan their full cooperation.

12. August 1997-December 1998. Following the Strategic Plan, the Office of Trust Fund Management (OTFM) which manages the trust funds and which reports directly to Homan, reforms its systems and brings them into compliance with trust standards.

13. 1998 Secretary Babbitt rejects Homan's plan for bring the BIA's management of trust assets and record keeping systems into compliance with trust standards. Instead, he adopts the High Level Implementation Plan, developed by Department officials,

none of whom has any prior trust management experience. Homan opines that the High level Implementation Plan will not bring those systems into trust compliance. For example, that plan will not go back to determine that the land ownership records are accurate. As a result, the BIA will still not be able to confirm that lease income is going to the right person. Regardless, Secretary remains committed to High Level Implementation Plan, which is just now beginning to be implemented.

1 4. November 1 998. Judge Lamberth issues order requiring Babbitt, Rubin and Gover to show cause why they should not be held in contempt in Cobell v. Babbitt and sets the trial for January 11, 1 999

1 5. January 5, 1 999. Secretary Babbitt, without consulting with Homan, issues Secretarial Order, making one of Homan's deputies the Principle Deputy Special Trustee, who while reporting to Homan, is given all day-to-day operational authority in the Office of Special Trustee. The person the Secretary names principle deputy is a career bureaucrat with no prior trust experience. Babbitt also tells Homan that he shall now report to the Secretary's chief of staff and the Assistant Secretary for Planning Management and Budget, instead of directly to the Secretary as called for in the Trust Reform Act.

16. January 7, 1999. Homan submits his resignation effective immediately

1 7. February 1, 1 999. President's FY 2000 Budget Request asks for \$ 90 million to clean up the trust fund problems and install new systems. This is three times what was requested in FY 99.

18. February 22, 1999. Judge Lamberth finds Secretaries Babbitt and Rubin and Assistant Secretary Gover in contempt of court.

1 8 During the six years he has been in office, Secretary Babbitt has not held a single meeting with tribal leaders or any other Indians on the issue of trust reform.

19. During the six years he has been in office, Secretary Babbitt has not testified at a single congressional hearing on trust reform issues. (There have been at least 10 such hearings before three different Senate and House Committees.)

ATTACHMENT B

- UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOISE PEPION COBELL,
et al.,

Plaintiffs,

Civil No. 96-1285

(RCL)

v.

BRUCE BABBITT, Secretary
of the Interior,

ROBERT RUBIN, Secretary of
the Treasury, and

KEVIN GOVER, Assistant
Secretary of the Interior,

Defendants.

MEMORANDUM OPINION

V. Conclusion

The court is deeply disappointed that any litigant would fail to obey orders for production of documents, and then conceal and cover-up that disobedience with outright false statements that the court then relied upon. But when that litigant is the federal government, the misconduct is even more troubling. The institutions of our federal government cannot continue to exist if

they cannot be trusted. The court here conducted monthly status conferences where plaintiffs complained that the government was not producing the required documents. Because of the court's great respect for the Justice Department, the court repeatedly accepted the government's false statements as true, and brushed aside the plaintiffs' complaints. This two-week contempt trial has certainly proved that the court's trust in the Justice Department was misplaced. The federal government here did not just stub its toe. It abused the rights of the plaintiffs to obtain these trust documents, and it engaged in a shocking pattern of deception of the court. I have never seen more egregious misconduct by the federal government. In my own experience, government lawyers always strived to set the example by following the highest ethical standards that were then a model for the rest of the legal profession, and the Justice Department always took the position that its job was not to win an individual case at all costs, but to see that justice was done. Justice has not been done to these Indian beneficiaries. Moreover, justice delayed is justice denied. The court cannot tolerate more empty promises to these Indian plaintiffs. The time has come for action, and the court will make full use of its powers to ensure that this case gets back on track.

The Department of Justice's handling of this litigation has markedly improved since the issuance of the Order to Show Cause. New counsel, Phillip Brooks, was assigned to handle the contempt proceedings, and he performed this unpleasant task with commendable candor, ably assisting the court in finding the facts and candidly acknowledging most of the problems that the court today discusses. The Assistant Attorney General for the Environment and Natural Resources Division attended the lengthy closing arguments in the contempt trial, where she heard the court express many of its concerns that it details today in this opinion. Shortly thereafter, the Assistant Attorney General personally filed a memorandum notifying the court of a complete restructuring of the trial team in this case, with new counsel to replace prior counsel, and additional counsel added to help ensure against repetition of the improper conduct the court today describes. The court views this as a hopeful sign, for the future, although it is too late to save the defendants from the contempt citations they have earned today.

After issuance of the order to show cause, Secretary Babbitt decided to reorganize the Office of Special Trustee and remove the key official responsible for document production in OST, Joe Christie. The Secretary did this without any prior discussion with the Special Trustee, prompting the Special Trustee to resign the next day. The Secretary took no action whatsoever to bring BIA into compliance, apparently being advised that there were few problems there and that the contempt problems all were the fault of OST. This opinion should cause Secretary Babbitt to now understand

that he was badly misinformed, and that his own inattention to detail and wholesale delegation of authority to individuals who

have not served- his-or the government' s-interest, may cause him future problems with this court if the government misconduct continues. The court views it as unfortunate for SecretaryThe court views it as unfortunate for Secretary Rubin that he has been tarnished with this contempt citation. What personal involvement he has had in this fiasco is unknown to the court, but what is clear is that he has totally delegated his responsibility to others and they have miserably failed to comply with this court's orders, as detailed in this opinion.

For the reasons stated above, the Court finds by clear and convincing evidence that Bruce Babbitt, Secretary of the Interior; Robert Rubin, Secretary of the Treasury; and Kevin Gover, Assistant Secretary, Department of the Interior are in civil contempt of this court's First Order of Production of Information, issued November 27, 1996 and subsequent Scheduling Order of May 4, 1998.

In this regard, the court will order that:

1.The defendants are ADJUDGED and DECREED to be in contempt of court.

2. The defendants shall pay plaintiffs' reasonable expenses, including attorneys' fees, caused by the defendants, failure to obey this court's First Order of Production of Information, issued November 27, 1996 and subsequent Scheduling Order of May 4, 1998.

3. The plaintiffs shall submit to the court within 30 days an appropriate filing detailing the amount of reasonable expenses and attorneys' fees incurred to date as a result of the defendants' failure to obey this court's two aforementioned orders.

4. A special master shall be appointed by the court in this case pursuant to Rule 53 of the Federal Rules of Civil Procedure. The special master will be named in a forthcoming order.

5 . The special master shall oversee the discovery process and administer document production, compliance with court orders, and related matters. Further duties of the special master shall be set out in a forthcoming order.

A separate order shall issue this date.

Royce C. Lamberth
United States District Judge