

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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U.S. DISTRICT COURT
DISTRICT OF COLUMBIA
2002 APR 25 PM 11: 29

ELOUISE PEPION COBELL, et al.,)
)
Plaintiffs,)
)
v.)
)
GALE A. NORTON, Secretary of the Interior,)
et al.,)
)
Defendants.)
)
_____)

NANCY M.
MAYER-WHITTINGTON
CLERK

Case No. 1:96CV01285
(Judge Lamberth)

**DEPARTMENT OF THE INTERIOR'S RESPONSE
TO THE SECOND INVESTIGATIVE REPORT OF THE
SPECIAL MASTER REGARDING THE OFFICE OF TRUST RECORDS**

The Secretary of the Interior and the Assistant Secretary - Indian Affairs ("Interior Defendants") submit the following response to the Second Investigative Report of the Special Master ("Report"), filed April 11, 2002, which addresses the trust records training program within the Office of Trust Records, Office of the Special Trustee for American Indians ("OST/OTR").

Interior Defendants object to the Report to the extent it concludes: (1) that OST/OTR has failed "to initiate a trust records training program that complies with the teachings of the [Indian] Trust [Fund Management] Reform Act [of 1994]." Report at 13; (2) that "none of the OST/OTR programs offer any practical guidance that could remotely be construed as 'training' appropriate to the definition, identification, categorization, disposition, preservation and maintenance of trust records." Id. at 24; and (3) that OTR's training curricula do not address the most rudimentary

aspects of trust recordkeeping, fail to distinguish between trust and non-trust records, and obscure the legal and ethical obligations underlying the maintenance of trust records. Id. at 27.

Trust records are a subset of Federal records and, as such, must be managed in accordance with Federal law. Federal law provides that "[t]he head of each Federal agency shall establish and maintain an active, continuing program for the economical and efficient management of the records of the agency," and states that "[t]he program, among other things, shall provide for . . . compliance with" Chapter 21 (law concerning the National Archives and Records Administration) and Chapter 29 (law concerning records management by the archivist of the United States and by the Administrator of General Services). See 44 U.S.C. § 3102; see also Report at 12 ("[A]ll federal records, including trust documents, are subject to the guidelines prescribed by the Federal Records Act . . ."); H.R. Rep. No. 105-163,¹ at 64 (1997) (stating that "[t]he Committee [on Appropriations] recognizes that there are all types of records (trust and non-trust) dispersed throughout BIA in inadequate environments" and that "[t]he Committee expects that the examination and disposal of these records will proceed in a manner that will be cost effective for all records, not just trust records").

Over the past two years, OST/OTR has initiated a records-management training program that, as the Special Master suggests, has focused largely on those generally-applicable principles of Federal records management to which all Federal records are subject. OST/OTR's first cycle of training, designated as records awareness training and directed at all employees, reached over 2,200 departmental employees. Interior Defendants' Status Report to the Court Number Eight,

¹Accompanying H.R. 2107, Department of the Interior and Related Agencies Appropriations Bill, 1998.

dated Jan. 16, 2002, at 143. The second cycle, aimed at employees with records maintenance and disposition as part of their duties, has reached approximately 560 managers, supervisors, and records personnel. Id.

Because trust records are subject to the law governing the management of all Federal records, Federal records-management training is a necessary component of the training required for trust records-keeping. Interior has therefore made a significant first step in developing a trust records-keeping training program. In other words, by providing federal records-management training, the OST/OTR training programs do offer some practical guidance regarding the disposition, preservation and maintenance of trust records. Likewise, they do address basic aspects of trust records-keeping and the obligations underlying the maintenance of trust records.

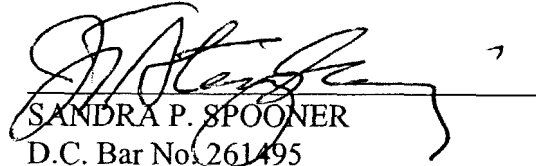
Interior acknowledges, however, that much work remains to be done. See Declaration of Ross Swimmer, Director of the Office of Indian Trust Transition ¶¶ 2, 5 (Ex. 1) (recommending that "[a]s part of the reorganization of trust activities being considered in the Department . . . that all trust operations training be centrally coordinated and managed" and stating that "DOI University has been requested to provide a description of how it could coordinate and deliver a comprehensive trust operations training program").²

²We also attach for the Court's information the views expressed by the Office of the Special Trustee in two unsworn memoranda. See Memorandum of April 22, 2002, from Tom Slonaker, Special Trustee for American Indians, to J. Steven Griles, Deputy Secretary (Ex. 2); Memorandum of April 25, 2002, from Tom Thompson, Principal Deputy Special Trustee for American Indians, to Tom Slonaker, Special Trustee for American Indians (Ex. 3).

Dated: April 25, 2002

Respectfully submitted,

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Deputy Assistant Attorney General
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Department of the Interior
Office of the Solicitor

DECLARATION OF ROSS SWIMMER

1. I am the Director of the Office of Indian Trust Transition. In that capacity, I am familiar with the trust operations of the Department and the efforts underway to reform and improve the delivery of trust services.
2. After reviewing the information gathered for the preparation of the 9th Quarterly Report, I have concluded that there is a need for better coordination of the training provided by the Department with respect to trust operations. As part of the reorganization of trust activities being considered in the Department, I am recommending that all trust operations training be centrally coordinated and managed.
3. Many managers reported that they were providing trust operations training, developing handbooks, and working with outside contractors, but there was little coordination of the training. Thus, the trainees are having to travel to various sites and on inconvenient schedules to obtain all of the training needed with respect to their trust responsibilities.
4. I have recently explored with the DOI University the possibility of it assuming the coordinating role for all trust operations training. It appears that DOI University can provide or arrange for training of all types necessary to support trust operations, including records management, land management, computer systems operations, and delivery of beneficiary services. DOI University can deliver that training in its multiple locations as well as other sites within Indian Country. For example, the training could be provided at tribally-controlled community colleges.
5. DOI University has been requested to provide a description of how it could coordinate and deliver a comprehensive trust operations training program.

I swear under penalty of perjury that the foregoing is true.

Date: April 25, 2002

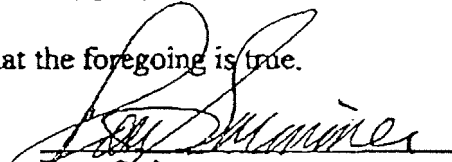

Ross Swimmer

Exhibit 1

Interior's Response to SM's Second
Investigative Report of OTR



United States Department of the Interior
OFFICE OF THE SPECIAL TRUSTEE FOR AMERICAN INDIANS
Washington, D.C. 20240

1.7.2

APR 22 2002

Memorandum

To: J. Steven Griles
Deputy Secretary

From: Tom Slonaker
Special Trustee for American Indians

Subject: Second Investigative Report of the Special Master Regarding the
Office of Trust Records

This responds to your request that I prepare and submit to you my suggested response to the Special Master's Second Report. I would appreciate a complete copy of his Report, including attachments. In the information available, the Special Master makes many valid points and offers helpful suggestions to improve records training. In my view, training can always be improved, and, in practice, should be improved on a continuing basis in response to constructive criticism and feedback.

In fact, over the course of the past two years, including the duration of the Special Master's oversight, the Office of the Special Trustee's (OST) Office of Trust Records (OTR) has received many helpful suggestions from BIA participants, observers and managers for improvement to the records training program. OTR has worked with the National Archives and Records Administration (NARA) to evolve and improve the training curriculum and training delivery based on these suggestions. Now, with receipt of these recommendations on training from the Special Master, OST will take appropriate action to incorporate his suggestions for improvement as well.

Given the short response time and the absence of guidance or assistance from the Solicitor's Office, I have not prepared a point-by-point response to the Special Master's Report.

Simply put, many of the facts and statements presented in the Special Master's report are irrefutable. He is correct in pointing out that training materials do not use the word "trust" in conjunction with the term "records management" in many instances. Nor does the material attempt to exhaustively list all types of trust records, even if possible. But we can improve on these two issues in training delivery and provide additional examples and illustrations. Likewise, his re-counting of the content of training materials and training modules appears accurate, as does his inventorying of the sites where records management training was conducted. There are other examples where the Special Master makes valid points as well. However, the inferences and conclusions drawn from these facts is where we may vary to some extent.

Exhibit 2

Interior's Response to SM's Second
Investigative Report of OTR

The Special Master examines training materials and declares the training effort an utter failure. We review that effort—what was intended and what has been accomplished—and see clear progress.

One could infer from the Special Master's Report that records management training is all but completed. We regularly state that records management training has merely begun and will be on-going.

We agree with the Special Master that "trust" records are Federal records—a subset of Federal records—that have special significance and rules regarding generation and protection. We believe that in the end the Federal records management program covers "trust" records; that proper training regarding Federal records management addresses and provides for "trust" records. "Trust" records are distinguished, or different, from other Federal records only to the degree program officials use appropriate records management policies and procedures to generate, manage, and preserve that subset known as "trust" records. Program management—not records management—officials are responsible for and must manage "trust records. Program management—not records management—officials must establish "trust" records management policies and procedures. Records management officials assist, oversee, and train the program management officials in administering the program management official's records duties, but they do not do it for the program official. I sense the Special Master sees it otherwise.

Clearly, we have not communicated successfully the responsibilities, purpose, and approach of the records management program nor the point of records management training. The point is that context is relevant in drawing conclusions about the status of records training efforts to date.

For instance, OTR is implementing the records management program within parameters set by Congress and the Department's senior leadership several years ago. Interior was directed and funded by Congress to plan and execute a records management program encompassing not only trust, but also BIA's non-trust records. The present OTR is charged with that job and the OTR programs follow that direction. The specific activities to fulfill that mandate were detailed in several approved and existing planning documents. The effort was, and is, entitled *Indian Affairs Record Management*, reflecting the direction to OTR to cover both trust and non-trust records within BIA in a unified approach to records management.

As you know, the records management training under discussion represents the initiation—the beginning—of a continuing program of records management instruction to BIA and OST employees. This effort began after years and years of neglect of Interior's trust records, and the failure to provide any meaningful records training for any staff, including trust staff. Various oversight groups, including NARA, documented

these deficiencies in decade-to-decade reviews of BIA's records programs. Some of these deficiencies applied to OST as well.

This first cycle of training (designated, in fact, as "records awareness" training) engaged more than 2,200 employees across the Department over the past two years, and has been completed in the face of many other competing demands on (and in the face of some outright opposition to) the OTR staff and program. Concurrently, records management program training was provided to more than 560 managers, supervisors, and records personnel with specific duties for records management.

OTR's partner in planning, organizing and delivering this training is the Federal Government's principal records organization, NARA. NARA is, of course, responsible for records management government-wide, and has a major interest and voice in deciding the success or the failure of the Department's records management program activities, including trust records.

I am pleased that the Special Master does not take issue with the thrust of training on trust duties and trust records as presented by Upper Mohawk. As the Special Master himself points out, the July 2000 joint records and trust fundamentals training presented by Messrs. Rossman and Fitzgerald to OTR staff is embodied in the current records management training being delivered by OTR staff and the Upper Mohawk trust fundamentals training. OST believes the two courses have a cumulative and complementary impact on records management and trust management in general. Together, individuals attending the two training courses will begin to be exposed to the body of knowledge the Special Master, and OST, believe is necessary to properly manage trust records. The courses, by design, reinforce and complement each other. OST believes the courses should be mandatory for all personnel generating or managing trust records, and the BIA leadership is now supportive of that position.

The Special Master's adverse characterizations of the efficacy of records training reflect his personal analysis. Regrettably, his position is no doubt predicated on his many frustrations and suspicions developed in previous dealings with the Department on other issues such as the OIRM move, IT security, trust document destruction, e-mail destruction, document production, etc.

Given more time, I could attempt to clarify the context and certain other issues around which his conclusions are arrayed. However, since I agree with the Special Master that more can be done to improve records management, the time would be better spent in an independent evaluation of the thrust of the Department's trust records management program, as both you and I have suggested recently. I believe input from the Special Master could be useful. Something positive, perhaps affirmation or perhaps re-direction, for the records program could come out of an independent review.

Therefore, we should move quickly to obtain a completely independent review of the state of the Department's trust records management program. I recommend we proceed quickly to jointly plan and initiate an independent peer review conducted by a team of acknowledged experts in the field of Federal records management and trust fiduciary requirements so that all of us will view the results as objective and fair.



United States Department of the Interior
OFFICE OF THE SPECIAL TRUSTEE FOR AMERICAN INDIANS
Washington, D.C. 20240

APR 25 2002

Memorandum

To: Tom Slonaker

From: Tom Thompson

Subject: Supplemental Response Information for the Special Master's 2nd
Investigative Report

In the meeting and teleconference held yesterday, April 24, 2002, with representatives of Interior and the Department of Justice you asked me to coordinate with and assist the Solicitor's Office to supplement information in your memorandum of April 22, 2002. Following is the information I furnished this afternoon, in the form of a copy of this memorandum, in response to specific questions posed from the Solicitor's Office.

Question: The Special Master asserts that "OST/OTR has utterly failed to initiate a trust records training program that complies with the teachings of the Trust Reform Act." Report, p. 13.

Supplemental Information: Acknowledging that training can always be improved, Interior may wish to point out that the Special Master's broad conclusion, based on facts presented in the Special Master's Report, can be viewed differently. Records Management training was initiated by OTR and NARA, as described by the Special Master. Trust records are in fact Federal records. Federal records training being delivered by OTR and NARA provides the framework for identifying and preserving all important records, including trust records. The records management training under discussion represents the initiation--the beginning--of a continuing program of records management instruction to BIA and OST employees engaged in Indian trust operations. Further, OST, through its training contractor Upper Mohawk, has presented trust fundamentals training, including information on trust records, to more than 1,600 trust personnel in a little over a year. Interior believes these courses reinforce and complement each other.

Question: The Special Master asserts that "none of the OST/OTR programs offer any practical guidance that could remotely be construed as training appropriate to the definition, identification, categorization, disposition, preservation and maintenance of trust records." Report, p. 24.

Supplemental Information: Contemporaneous feedback in the form of training evaluations from participants seems to indicate otherwise for many of those attending. Federal records training being delivered by OTR and NARA provides an adequate framework for identifying and preserving all important records, including trust records. The records management training under discussion represents the beginning of a continuing program of records management instruction.

Exhibit 3

Interior's Response to SM's Second
Investigative Report of OTR

Question: The Special Master asserts that "OST/OTR's records training program has brought about little change since the system was described as broken." Report, p. 24.

Supplemental Information: Interior may wish to point out that this is a subjective area, i.e. "change", and difficult to measure. Interior has not specifically attempted to do so. Interior might question whether the Special Master's Report presents concrete facts or evidence to warrant this assertion.

Question: "OTR has produced training curricula that do not address the most rudimentary aspects of trust recordkeeping." Report, p. 27.

Supplemental Information: Interior may wish to point out that training on the Federal Records Act, as presented by OTR and NARA to more than 2,700 personnel, was focused on the "rudiments", and more, of the management of federal records, including trust records. Other training offered outside of the OTR venue also reinforces proper trust records management. For instance, Interior, through the OST Training subproject and its Upper Mohawk training contractor, has also presented trust fundamentals training, including information on trust records, to more than 1,600 trust personnel over the past year plus. Interior has worked with Upper Mohawk to evolve and strengthen the training curricula here as well, and Interior believes these courses reinforce and complement each other.

cc:

Counselor to the Solicitor

CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on April 25, 2002, I served the foregoing Department of the Interior's Response to the Second Investigative Report of the Special Master Regarding the Office of Trust Records, in accordance with their written request of October 31, 2001, upon:

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Lorna Babby, Esq.
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Dennis M Gingold, Esq.
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by U.S. Mail upon:

Elliott Levitas, Esq.
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by facsimile and U.S. Mail upon:

Alan L. Balaran, Esq.
Special Master
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and by hand delivery upon:

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Melanie VanBlarcom