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## Report Finds Oil Firms Paid Indians Less for Land

Special Master Urges Full Probe of Leases

By Carol D. Leonnig  
Washington Post Staff Writer  
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Oil and gas companies paid Indians whose land is managed by the government just a fraction of the amounts they paid private landowners for the right to run pipelines across their property, arrangements that were approved by Interior Department officials, according to an investigative court report released yesterday.

For natural gas and oil pipelines running across the San Juan basin in New Mexico, for example, utility companies paid \$25 to \$40 for the right to cross every 5 1/2 yards of Navajo land managed by the government. But on adjoining properties, the investigation found, the companies paid \$140 to \$577 to cross the same amount of land owned and managed by private individuals and companies.

A special master appointed by a federal judge in Washington released the findings yesterday, urging the judge to end the disparities and order a full investigation into how Interior Department officials value leases for Indian lands they control.

The special master, Alan L. Balaran, also reported that the Interior Department's chief appraiser of Indian trust land admitted destroying his computerized appraisal records last fall and misplacing key documents relating to how he valued Indian properties in New Mexico and Arizona.

The Native American groups have been involved in a seven-year legal battle with the Interior Department that seeks a fair accounting of government-managed Indian lands and money, one of the largest class-action lawsuits in U.S. history, with 300,000 plaintiffs. U.S. District Judge Royce C. Lamberth has already determined that the government failed in its fiduciary responsibilities to the Indians and is trying to determine damages and how to repair the system.

The Indian groups said they would sue the department again for damages based on Balaran's conclusions. They said they would seek uncollected revenue that would have been generated by leasing the rights at fair market value, and contended the government conspired with utility companies to keep lease rates low.

"Why are Indians getting pennies on the dollar for what others get?" asked Keith Harper, attorney with the Native American Rights Fund. "These people are essentially being robbed of their inheritance. You have sweetheart deals with oil and gas companies. And you have the top people at Interior saying it's okay, and aiding this corrupt practice."

Interior officials responded that they had asked Lamberth to remove Balaran from his post, alleging Balaran is biased in favor of Native Americans. "This is clearly another faulty and biased report from the special master," said Interior Department spokesman Dan DuBray. "We believe an independent, objective . . . review of Interior's appraisal activity will find it is reasonable and appropriate."

Lamberth appointed Balaran last year to investigate whether the government was properly documenting and safeguarding money owed to 500,000 Native Americans from grazing, mineral and utility leases on

land the government has managed since 1887. Indians say they are owed billions of dollars in compensation for the government's mismanagement of their trust accounts.

Balaran's report reviewed the utility leasing arrangements for the Navajo Nation, the largest Indian reservation in the country at 16 million acres. He focused on two large right-of-way leases on Eastern Navajo lands in New Mexico, Arizona and Utah.

Interior's former chief appraiser, Anson Baker, told Balaran that Indian trust lands receive "much less" money for rights of way because he feared that setting values comparable to private landholder leases could encourage gas and oil companies to try to have the Indian properties condemned. Balaran called that explanation "suspect" because no company had sought condemnation of Indian property in Baker's 20-year tenure.

Balaran said Baker did not, as required by department order and the agency's fiduciary duty, document any justification for his appraisals, or any reason for the discrepancies between Indian trust and other lands.

Ross Swimmer, the newly confirmed special trustee for American Indians and an assistant secretary of Indian affairs during the Reagan administration, explained to Balaran that he believed leases on Indian trust lands were likely less valuable to utility companies because of the "bureaucracy" involved in leasing land with the federal government.

"If I were to value the land next door to that Indian land, same land, identical, I would probably put a higher value on non-Indian land," Swimmer said in a June 23 deposition. "Just a matter of bureaucracy. If I can lease the land next door at a comparable price, then I would do that rather than lease the Indian land."

An official with the Association of Oil Pipelines declined to comment on the findings, saying the group needed more time to review the report.

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**THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

ELOUISE PEPION COBELL, et al.,	)	
	)	
Plaintiffs,	)	
v.	)	Civil Action No. 1:96CV01285 (RCL)
	)	
GALE NORTON, Secretary of the	)	
Interior, et al.,	)	
	)	
Defendants.	)	

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**SITE VISIT REPORT OF THE SPECIAL MASTER  
TO THE OFFICE OF APPRAISAL SERVICES IN GALLUP, NEW MEXICO  
AND THE BUREAU OF INDIAN AFFAIRS NAVAJO REALTY OFFICE  
IN WINDOW ROCK, ARIZONA**

On March 6, 2003, the Special Master, in the company of attorneys representing the Department of Justice and the Office of the Solicitor, visited the Office of Appraisal Services (“OAS”) of the Navajo Regional Office (“NRO”) of the Office of the Special Trustee for American Indians (“OST”) located in Gallup, New Mexico and the Bureau of Indian Affairs (“BIA”) Realty Office in Window Rock, Arizona. The purpose of the site visit was to determine whether individual Indian trust information concerning the appraisal of the value of rights-of-way (“ROWS”)<sup>1</sup> and easements running across Navajo allotments was being preserved, maintained, and safeguarded in accordance with Court orders.<sup>2</sup>

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<sup>1</sup> A Right-of-Way (ROW) grant is an authorization to use a specific piece of public land for specific facilities for a specific period of time. Congress authorized grants of ROWs over Indian lands in 1948 legislation. See Act of Feb. 5, 1948, ch. 45, 62 Stat. 17, 25 U.S.C. §§ 323-328. A grant over tribal land requires “consent of the proper tribal officials,” § 324, and the payment of just compensation, § 325, as do ROWs granted over lands of individual Indians. *Id.* The vast majority of ROWs granted are authorized by Title V of Federal Land Policy And Management Act of 1976 (43 U.S.C. §§ 1761-1771) and Section 28 of the Mineral Leasing Act of 1920, as amended, 43 U.S.C. § 185.

<sup>2</sup> On February 22, 1999, this Court found defendants Secretary of the Interior Bruce Babbitt, Secretary of the Treasury Robert Rubin, and Department of the Interior Assistant Secretary, Indian

During the site visit, the Special Master examined appraisal files located in the Gallup Regional Appraisal Office and easement files located in the Window Rock BIA Realty Office. The Special Master also interviewed former Chief Appraiser Anson Baker (who was present during the Special Master's site visit),<sup>3</sup> Regional Appraiser Robert Hatfield (who was being trained by Baker at the time), and BIA Realty Officer Stephen Graham.

The site visit uncovered several problems. At the outset, Baker admitted to the Special Master that, before he transferred to the OST-OAS-Northwest Regional Appraisal Office in September 2002, he "erased" all of the appraisal information stored on his computer.<sup>4</sup> He also admitted he was unable to locate "two memoranda," which he utilized to formulate his appraisal valuations; that his appraisal workfiles lacked documentation supporting his ROW valuations;<sup>5</sup> and

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Affairs Kevin Gover to be in civil contempt of the Court's orders of November 27, 1996 and May 4, 1998. Two days later, in accordance with Rule 53 of the Federal Rules of Civil Procedure and with the consent of both parties, this Court appointed the undersigned to serve as special master in this litigation. The Special Master was ordered to "oversee the discovery process in this case to ensure that discovery is conducted in the manner required by the Federal Rules of Civil Procedure." Order dated February 24, 1999, at 2. To fulfill his duties, the Court authorized the Special Master to "do all acts and take all measures necessary or proper for the efficient performance of the master's duties, as set forth in this order." *Id.* Less than six months later, the Court, by consent of the parties, expanded the order of reference to include oversight of "the Interior Department's retention and protection from destruction of IIM Records through, among other things, on-site visits to any location where IIM Records are not being protected from destruction or threatened destruction." *Cobell v. Babbitt*, August 12, 1999 Order at 2. The site visit to the OAS and BIA Realty facilities was undertaken pursuant to these orders.

<sup>3</sup> Between 1980 and 2002, Baker served as an appraiser in the BIA Navajo Regional Appraisal Office – the last four as Chief (or Regional/Supervisory) Appraiser. In 2002, Baker was transferred to the Northwest Regional Appraisal Office in Portland, Oregon.

<sup>4</sup> Baker insisted he "never destroyed any federal documents." As this report focuses primarily on the destruction of trust information in light of the Court's orders and the Secretary's fiduciary responsibilities, it will not examine Baker's inadvertent admission that he may have violated the Federal Records Act, 44 U.S.C. §§ 2101-18, 2901-09, 3101-07, 3301-24.

<sup>5</sup> A review by the Special Master of these files confirmed Baker's statements, as did Baker's inability to produce any appraisal file containing supporting documentation in response to the

that based on those valuations, Navajo allottees receive payments for ROWs “much less” than those payments received by neighboring tribes and private landowners. When the Special Master asked Baker why he appraised allottee ROWs at a value lower than the amount paid for ROWs running across private and tribal lands, the Chief Appraiser responded that he did so out of concern that a valuation commensurate with the valuation of private and tribal holdings would invite protracted condemnation proceedings by Oil and Gas (“O&G”) Companies.

At the Window Rock Office of the BIA, Realty Officer Graham asserted Navajo allottees do not receive “the benefit of their bargain,” *i.e.*, ROW payments comparable to those received by similarly situated private and tribal landowners. He also described a process whereby O&G Company representatives – not delegates of the Secretary – contact, negotiate with, and secure the approval of Navajo allottees to the proposed ROWs.

This Report examines these findings and representations in the context of the Court’s orders and the Secretary’s trust responsibilities to maintain a complete and accurate set of appraisal documentation and ensure that the Navajo allottees receive “fair market value” for ROW leases running across their lands.<sup>6</sup> For the reasons stated below, it is the conclusion of the Special Master that the failure of the Secretary’s appraisal-delegates to safeguard appraisal information as required by court order, federal regulation, industry standard, and fiduciary law, has directly

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Special Master’s express invitation to do so.

<sup>6</sup> See 25 CFR § 169.12 (Consideration for right-of-way grants) (“Except when waived in writing by the landowners or their representatives as defined in § 169.3 and approved by the Secretary, the consideration for any right-of-way granted or renewed under this Part 169 shall be not less than but not limited to the fair market value of the rights granted, plus severance damages, if any, to the remaining estate. The Secretary shall obtain and advise the landowners of the appraisal information to assist them (the landowner or landowners) in negotiations for a right-of-way or renewal”) (emphasis added).

harmed Navajo trust beneficiaries by denying them access to information necessary to meaningfully evaluate and potentially challenge the ROW valuation process.

As context for this conclusion, it is necessary to describe the functions of the Office of Appraisal Services and the geographical area served by the Office of the Special Trustee's Regional appraisers. This report will then examine the ROW appraisal reports reviewed by the Special Master in the context of the standards regulating the appraisal industry and the fiduciary duties governing the Secretary and her appraisal-delegates. Finally, this report will focus on the practical consequences of the Secretary's failure to retain and safeguard vital individual Indian trust information.

#### Office of Appraisal Services

Appraisals performed by OAS are among the functions performed by the BIA Regional Real Estate Services Program ("RESP"). Under this program, BIA oversees more than 16 million acres of Tribal trust, allotted, and government-owned lands. Beginning in June 2002, RESP has operated under the authority of the Office of the Special Trustee.<sup>7</sup>

In addition to the locations in Gallup, New Mexico and Window Rock, Arizona, the BIA Navajo Region maintains agency offices in Tuba City, Arizona (Western Navajo); Chinle, Arizona (Chinle Agency); Fort Defiance, Arizona (Fort Defiance Agency); Shiprock, New Mexico

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<sup>7</sup> See Secretarial Order 3240 (Subject: Realignment of Indian Lands Valuation and Appraisal Functions) ("realign[ing] the Indian lands valuation and appraisal functions from the Bureau of Indian Affairs (BIA) to the Office of the Special Trustee (OST)") (Exhibit 1); December 20, 2001 Letter from former Assistant Secretary - Indian Affairs Hilda Manuel to Patrick Carr, President Indian Educator's Federation, AFT-AFL/CIO (providing "formal notification of the transfer of the Indian lands valuation and appraisal functions currently in the Bureau of Indian Affairs (BIA) to the Office of the Special Trustee for American Indians (OST)"); (Exhibit 2); Memorandum from Director, Bureau of Indian Affairs, Terrence Virden to All Regional Directors (June 25, 2003) ("In June 2002, the Real Estate Appraisal function was transferred from the Bureau of Indian Affairs (BIA) to the Office of the Special Trustee (OST)"). (Exhibit 3.)

(Shiprock Agency); and Crownpoint, New Mexico (Eastern Navajo Agency). Although the authority of the Navajo Regional Director to administer O&G leases on Navajo allotted lands was rescinded in November 2000 and re-delegated to the Farmington Indian Minerals Office (FIMO), (see Shii Shi Keyah Association, et al. v. Hodel (Case No. 84-1622M)), the Regional Director maintains authority over all other real property transactions, including ROWs. See Memorandum from M. Sharon Blackwell, Deputy Commissioner - Indian Affairs, to the Regional Director, Navajo Region and FIMO Director (Nov. 28, 2000). (Exhibit 4.)

The Eastern Navajo Agency Real Estate Services Office, “as the trustee to the Navajo Tribe,” has jurisdiction over Navajo lands located in New Mexico, Arizona, and Utah, and is charged with providing “professional and quality services in all areas of realty transactions affecting tribal and individual Indian trust lands and natural resources, through education and management.” Mission Statement of ENARESO (OTRM09646).<sup>8</sup>

#### Eastern Navajo Agency

The Navajo Nation occupies the largest Indian reservation in the United States, comprising approximately 16 million acres, or about 25,000 square miles. The Eastern Navajo Region spans approximately 2,806,632 acres of land, including reservation land, tribal trust land, tribal fee land,

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<sup>8</sup> Three months after the Special Master’s site visit, the Secretary consolidated the real estate appraisal functions formerly performed by various agencies under the supervision of the National Business Center. The Secretary’s action was purportedly initiated in response “to long-standing concerns about the management of appraisal functions as documented for several decades in reports issued by Interior’s Inspector General, the General Accounting Office” and by the Appraisal Foundation and an interagency team under the auspices of the Bureau of Land Management.” Press Release, United States Department of the Interior, *Norton Announces Reform of Real Estate Appraisal Function* (June 19, 2003). (Exhibit 5.)

areas privately owned by Navajo, land belonging to the Canoncito and Alamo Bands, U.S. Government Reserve, public land (leased by the Navajo Tribe and individual Navajo Indians), public land (permitted to individual Navajo Indians by the Bureau of Land Management), New Mexico State Lands (leased by the Navajo Tribe), and individual Indian Allotments that comprise 623,354.21 acres.

The Eastern Navajo Region, also known as the “checkerboard,”<sup>9</sup> readily lends itself to the instant discussion of missing trust information and its impact on ROW valuations and comparisons, as each pipeline crossing the region invariably runs across private, tribal, and allotted parcels of land.<sup>10</sup>

#### ROW Approval Process on Navajo Allotted Lands

Prior to 1985, ROW transactions were processed by the BIA Realty Office in Window Rock, Arizona. In 1985, these transactions were transferred to the Eastern Navajo Agency in Crownpoint, New Mexico. All superintendent positions were later eliminated for the Navajo

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<sup>9</sup> According to New Mexico Senator Jeff Bingaman, the checkerboard represents

the Federal Government[’s] attempt[] to force Indian people to assimilate by breaking up traditional tribal lands and allotting parcels of the land to individual tribal members. In New Mexico, this policy created what is known as the ‘checkerboard,’ because alternating tracts of land are now owned by individual Navajos, the state, the federal government, or private landowners.

Senator Bingaman, Statement on S. 1315, Senate Committee on Indian Affairs and House Resources Committee (November 4, 1999).

<sup>10</sup> As the attached map indicates, a spider web of pipelines spreads throughout the checkerboard area, originating from the San Juan Basin (the “Basin”) of northwest New Mexico and southwest Colorado. (Exhibit 6.) The Basin is the second-largest gas field in the conterminous U.S., (see [http://aapg.confex.com/aapg/rm2002/techprogram/paper\\_63556.htm](http://aapg.confex.com/aapg/rm2002/techprogram/paper_63556.htm)), sprawling across 7,800 square miles and currently producing ten percent of the nation’s natural gas production.

region,<sup>11</sup> and signature authority reverted to Window Rock, except for ROW documents which remained on file at the Eastern Navajo Agency. See Memorandum from Blackwell (Nov. 28, 2000). (Exhibit 4.) Today, as before 1985, all ROW transactions are handled by the BIA Realty Office in Window Rock.

According to Baker and Graham, an O&G Company initiating or renewing a request for a pipeline ROW over allotted land first contacts the BIA Navajo Regional Office and then the individual allottee interest holders to obtain majority approval. Once the O&G Company identifies the interest holders and obtains their consent (*via signature or thumb print*), it informs the BIA and provides the agency with its own appraisal report valuing the ROW.<sup>12</sup> BIA then submits the O&G Company's appraisal to the OAS for review by either the supervisor or staff appraiser. According to Realty Officer Graham, BIA does not insinuate itself in the process of advising or obtaining the approval of the interest holders.<sup>13</sup>

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<sup>11</sup> The five Navajo Region agencies - Chinle, Eastern Navajo, Fort Defiance, Shiprock, and Western Navajo – “are under the supervision of their respective program division heads located in the Navajo Regional Office.” 130 DM 6 (April 21, 2003).

<sup>12</sup> Cf. Memorandum from Eldred Lesensee, Albuquerque Area Office Chief Appraiser to Area Director, Minneapolis Area Office (November 30, 1998) (“As standard practice when submitting a Right of Way application to the BIA Agency, an applicant should provide to the Agency Superintendent an appraisal report supporting his/her offer of consideration. The BIA Agency Superintendent should forward the appraisal report to the BIA Review Appraiser for review and approval prior to negotiations on the consideration”). (Exhibit 7.)

<sup>13</sup> *Graham* attributed Interior's detachment from the appraisal process to a lack of resources that are necessary to retain the services employees who both understand the appraisal process and are fluent in the Navajo language – the only language spoken by many of the allottees. By way of contrast, BIA representatives actively interface between beneficiaries and those seeking to lease land for agricultural purposes. Typically, BIA field representatives send a “90 Day Letter of Notice for Leasing and Permitting” to each of the allottees that includes a description of the allotment, explains the manner in which the allottee can enter into a valid lease, and informs the allottee that the BIA “has or is in the process of preparing an appraisal of the fair market rental of this tract which will be furnished to you at your request.” (Exhibit A - Under Seal.)

Appraisal Files Reviewed by the Special Master

In addition to reviewing several files at the Gallup and Window Rock offices, the Special Master requested production of two ROW appraisal files. One of these files, generated in response to a request by an [unnamed] Gas Company for a nine-year renewal of a ROW crossing 55 Navajo allotments (“55 Allotment Restricted-Use Appraisal File”), contained the following documents:

- (1) 56 identical (sequentially numbered) single-page “Requests For Real Estate Appraisals generated by Acting Realty Officer Genni Denetsone to the Regional Chief Appraiser;”
- (2) a memorandum from Acting Realty Officer Dale Underwood to Anson Baker requesting an opinion on the [unnamed] Gas Company request;
- (3) a request for appraisal dated September 30, 1977;
- (4) a request for appraisal dated September 13, 1988; and
- (5) 55 identical four-page “Restricted-Use Appraisal” Reports (“55 Allotment Restricted-Use Appraisal Reports”) signed by Chief Appraiser Anson Baker on June 29, 2001.

(Exhibit B - Under Seal.)<sup>14</sup>

The second ROW appraisal file reviewed by the Special Master contained a request for a 20-year ROW easement running across seven Navajo allotments. (“Seven Allotment Appraisal”). Attached to the request was a “Complete-Summary Appraisal Report,” prepared by the requesting

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<sup>14</sup> Page One of the 55 Allotment Restricted-Use Appraisal Reports sets out “Assumptions, Limiting Conditions,” and a “Definition of Fair Market Value;” Page Two contains the “Purpose of Appraisal,” “Appraisal Methodology,” “Effective Date of Appraisal,” “Description of Right-of-Way Easements Being Renewed,” and “Real Property Interest Appraised and Market Data Used in this Appraisal Report;” Page Three includes a discussion regarding the “Highest and Best Use,” “Market Data Analysis,” “Estimated Marketing Time,” and “Fair Market Value Estimate;” and Page Four consists of a Certification attesting to the signatory’s (i.e., Chief Appraiser Anson Baker’s) objectivity.

[unnamed] Pipeline Company (and valuing the 50-foot-wide pipeline easement at approximately \$8.94 per rod<sup>15</sup>) and a document entitled, “Seven Allotment Review.” (Exhibit C - Under Seal.) Described as a “technical” or “desk” review, the Seven Allotment Review was purportedly generated “to determine if the appraisal report has been written in accordance with those recognized methods and techniques of appraisal that are necessary to produce a credible appraisal.” Seven Allotment Review at 1.

The Special Master’s review of the 55 Allotment Restricted-Use Appraisal File and the Seven Allotment Appraisal File revealed that neither contained any documentation supporting their respective valuations.<sup>16</sup> In the 55 Allotment Restricted Use Appraisal Report, for example, Baker represented that he “researched the real estate market for the comparable going rates being paid for similar right-of-way easements across Navajo Allotment lands,” *id.* at 2, and that based on that research, “the past going rate for similar easements was \$25 to \$40 per rod for 20-year easements across Navajo Allotment lands,” and “[t]he current going rate paid for similar easements is \$25 to \$40 per rod for 20-year easements across Navajo Allotment lands.” *Id.* at 2-3. There is no documentary evidence in the appraisal file, however, substantiating that Baker’s research was actually conducted, confirming past and present market conditions, or identifying the “similar easements” Baker used to formulate his comparisons.

Similarly, in the Seven Allotment Appraisal Report, Baker references his research of historical payments for ROWs across Navajo allotments as well as his “market data research” for

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<sup>15</sup> A rod is a traditional unit of distance equal to 5.5 yards (16 feet 6 inches or exactly 5.0292 meters. <http://www.unc.edu/~rowlett/units/dictR.html> (June 27, 2003). According to Baker’s calculation, the easement market value estimate by the [unnamed] Pipeline Company’s appraiser amounted to \$5.50 per rod. No explanation of this discrepancy was found in the appraisal file.

<sup>16</sup> Each of the ROW files reviewed on site were equally void of supporting information.

“going rates paid.” Noting that, from 1990 to the present, “the going rate paid for R/W easements across Navajo Allotments has been *in the range of \$25 to \$40 per rod for a R/W easement with a 20-year term*,” Baker opined that the [unnamed] Pipeline Company’s offer of \$40 per rod as the market value payment for this easement “is within and [sic] acceptable rate of market value.” Appraisal Review at 3. Here, too, there is no documentation in the file evidencing any “market data research,” supporting Baker’s assessment of the “going rates paid,” attesting to the range of \$25-40 paid for ROWs, or memorializing the [unnamed] Pipeline Company’s offer of \$40 per rod.

Whether the aforementioned supporting documentation was destroyed, erased, or misplaced is unknown.<sup>17</sup> What is known is that Baker deliberately erased all appraisal information from his computer and inadvertently misplaced at least two appraisal-related documents – all without any awareness that he had violated a Court order or breached any regulations.

As demonstrated below, whatever the cause of the missing information, its absence from the appraisal workfiles *constitutes a violation of Court orders, federal guidelines, industry standards, and the Secretary’s statutory and common-law obligations to maintain complete files for all transactions affecting trust beneficiaries. More significantly, its absence prejudices individual*

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<sup>17</sup> One possibility is that these documents were never generated *in the first place*. It may be argued that the failure on the part of the Secretary’s appraisal-delegates to generate a complete set of supporting documents constitutes an independent breach of fiduciary duty. *See Cobell v. Norton*, 240 F.3d 1081, 1105 (D.C. Cir. 2001) (“The government’s broad duty to provide a complete historical accounting to IIM beneficiaries necessarily imposes substantial subsidiary duties on those government officials with responsibility for ensuring that an accounting can and will take place. In particular, it imposes obligations on those who administer the IIM trust lands and funds to, among other things, maintain and complete existing records, recover missing records where possible, and develop plans and procedures sufficient to ensure that all aspects of the accounting process are carried out”) (emphasis added).

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Norton admits Interior hid facts from Congress  
THURSDAY, JULY 24, 2003

A controversial land swap between the federal government and the state of Utah is being canceled after an independent review found significant problems with the transaction.

The state was to gain 135,000 acres said to be worth \$35 million. But Bureau of Land Management experts said the proper appraisal value was about \$100 million.

"The Department of Interior bears the responsibility for ensuring that we present accurate facts to the Congress and the public," Norton wrote in a letter quoted by the Associated Press. "In this instance, we did not live up to that responsibility."

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[Administration Cancels Swap of Federal Land With Utah](#) (The Washington Post 7/24)

[Report Faults Lopsided Utah Land Deal](#) (AP 7/23)

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July 30, 2003

## POLITICS AND POLICY

FROM THE ARCHIVES: July 30, 2003

## Oregon Water Saga Illuminates Rove's Methods With Agencies

By **TOM HAMBURGER**  
 Staff Reporter of THE WALL STREET JOURNAL

WASHINGTON -- In a darkened conference room, White House political strategist Karl Rove was making an unusual address to 50 top managers at the U.S. Interior Department. Flashing color slides, he spoke of poll results, critical constituencies -- and water levels in the Klamath River basin.

At the time of the meeting, in January 2002, Mr. Rove had just returned from accompanying President Bush on a trip to Oregon, where they visited with a Republican senator facing re-election. Republican leaders there wanted to support their agricultural base by diverting water from the river basin to nearby farms, and Mr. Rove signaled that the administration did, too.

Three months later, Interior Secretary Gale Norton stood with Sen. Gordon Smith in Klamath Falls and opened the irrigation-system head gates that increased the water supply to 220,000 acres of farmland -- a policy shift that continues to stir bitter criticism from environmentalists and Indian tribes.

Though Mr. Rove's clout within the administration often is celebrated, this episode offers a rare window into how he works behind the scenes to get things done. One of them is with periodic visits to cabinet departments. Over the past two years Mr. Rove or his top aide, Kenneth Mehlman -- now manager of Mr. Bush's re-election campaign -- have visited nearly every agency to outline White House campaign priorities, review polling data and, on occasion, call attention to tight House, Senate and gubernatorial races that could be affected by regulatory action.

Every administration has used cabinet resources to promote its election interests. But some presidential scholars and former federal and White House officials say the systematic presentation of polling data and campaign strategy goes beyond what Mr. Rove's predecessors have done.

"We met together and talked a lot about issues of the day, but never in relation to polling results, specific campaigns or the president's popularity," says Lisa Guide, a political appointee at Interior

### A RIVER RUNS THROUGH HIM

A look at Karl Rove's involvement in the Klamath River dispute:

"Control of Congress will turn on handful of races decided by local issues, candidate quality, money raised, campaign performance, etc."

--From Rove's 1/6/02 presentation to Interior Dept. officials

**Jan. 5, 2002:** Rove accompanies Bush, who lost Oregon by less than 1% in 2000, to Portland, Ore.; Bush voices support for Klamath Basin farmers.

**Jan. 6:** Rove gives presentation to Interior Department officials connecting regulatory actions in key states, including Oregon's Klamath issue, to Republican prospects in the coming elections.

**Feb. 2:** Rove meets with farmers in Oregon.

**March 29:** Bush administration sides with farmers, diverts waters for agricultural use.

**Sept. 21:** Thousands of salmon die in the shallower Klamath River.

**June 25, 2003:** Regional officials tell Klamath farmers the flow of irrigation water needs to be curtailed; worried congressmen call Rove's office for help. The decision is reversed later in the day.

during the Clinton administration. Frank Donatelli, political director in the Reagan White House, says "we were circumspect about discussing specific administration rulings that had yet to be made."

Mr. Rove declined to comment. White House spokeswoman Ashley Snee says the agency visits simply were designed to keep political appointees apprised of the president's accomplishments and priorities.

Klamath River water levels were an issue at least as far back as the 2000 presidential campaign. During the unusually dry summer of 2001, angry farmers stormed the head gates to forcibly release water, but the Bush administration generally resisted their demands. In 2002, the issue continued to loom large as Mr. Smith faced a potentially difficult re-election challenge.

On Jan. 5, Mr. Rove accompanied the president to an appearance in Portland with Mr. Smith. The president signaled his desire to accommodate agricultural interests, saying "We'll do everything we can to make sure water is available for those who farm."

The next day, Mr. Rove made sure that commitment didn't fall through the cracks. He visited the 50 Interior managers attending a department retreat at a Fish and Wildlife Service conference center in Shepherdstown, W.Va. In a PowerPoint presentation Mr. Rove also uses when soliciting Republican donors, he brought up the Klamath and made clear that the administration was siding with agricultural interests.

His remarks weren't entirely welcome -- especially by officials grappling with the competing arguments made by environmentalists, who wanted river levels high to protect endangered salmon, and Indian tribes, who depend on the salmon for their livelihoods. Neil McCaleb, then an assistant Interior secretary, recalls the "chilling effect" of Mr. Rove's remarks. Wayne Smith, then with the department's Bureau of Indian Affairs, says Mr. Rove reminded the managers of the need to "support our base." Both men since have left the department.

#### IN OREGON . . .

In Quest for Steady Work, a Man Traces State's Decline<sup>1</sup>

An Interior spokesman, Mark Pfeifle, says Mr. Rove spoke in general terms about the Klamath conflict in the course of a broader discussion. Without directing a policy outcome, Mr. Pfeifle says, Mr. Rove simply "indicated the need to help the basin's farmers."

In the end, that is what happened when Interior reversed its previous stance and released more water. Mr. Rove's intervention wasn't the only reason. Mr. McCaleb himself says the biggest factor was a report from the independent National Research Council, which questioned the basis on which Interior scientists had made earlier Klamath flow decisions.

But Mr. Rove didn't let the matter drop after the Shepherdstown meeting. Weeks later, he returned to Oregon and met with a half-dozen or so farmers and ranchers. Thereafter, the White House formed a cabinet-level task force on Klamath issues. The results became clear on March 29, when the water was released to parched farms.

That hasn't ended the controversy. Environmentalists blame the change in water levels for the subsequent death of more than 30,000 salmon, calling it the largest fish kill in the history of the West.

A National Marine Fisheries Service biologist, Michael Kelly, has asked for protection under federal "whistle-blower" laws, saying he was subjected to political pressure to go along with the low-water plan and ordered to ignore scientific evidence casting doubt on the plan. This month, a federal judge ruled the administration violated the Endangered Species Act in the way it justified the water diversion.

Administration officials note that the judge found fault only with a narrow portion of the biological opinion, and didn't order changes in water flow. Interior is investigating the cause of the fish kill, Mr. Pfeifle says.

Oregon farmers point to other factors in the salmon kill, including water temperature and the presence of an infectious disease during salmon-spawning season. And they haven't stopped pressing to keep the irrigation water coming.

A few weeks ago, the federal Bureau of Reclamation in Klamath Falls warned farmers that the department would curtail the irrigation flow. Irate, Republican Rep. Greg Walden began making calls to protest. His first one went to Mr. Rove's office.

Within hours, the idea was dropped. Interior officials say managers from two cabinet departments agreed on a way to avoid it.

**Write to** Tom Hamburger at [tom.hamburger@wsj.com](mailto:tom.hamburger@wsj.com)<sup>2</sup>

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*Updated July 30, 2003*

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,  
on their own behalf and on behalf of  
all persons similarly situated,

Plaintiffs,

vs.

GALE NORTON, Secretary of  
the Interior, et al.,

Defendants.

Case No.96CV1285 (RCL)

PLAINTIFFS' OPPOSITION TO INTERIOR DEFENDANTS' MOTION AND  
MEMORANDUM TO REQUIRE PLAINTIFFS' COMPLIANCE WITH COURT'S  
ORDERS CONCERNING "ATTACHMENT C"

On April 11, 2003, this Court held that the document called "Attachment C" should remain under seal in this case. *Cobell v. Norton*, 257 F. Supp.2d 203, 206 (D.D.C. 2003) ("The Court has determined that the document included as Attachment C to the August 8, 2002 special report of the Monitor shall remain under seal."). Accordingly, the Court ordered that "all references to the content of Attachment C in the filings in this case should either be sealed or stricken from the record in this case." *Id.* (emphasis added).<sup>1</sup>

On May 1, 2003, Norton filed the motion under present consideration<sup>2</sup> which, in essence, seeks to modify the Court's April 11, 2003 Order by requiring the impossible: Removal from the public record all references to Attachment C. Although styled as a Motion to "Require

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<sup>1</sup>Although plaintiffs continue to be puzzled why the record must be sanitized to delete information widely discussed in the media through, in part, actual interviews with the former Special Trustee that evidence Norton's continuing breach of trust and litigation misconduct as well as, at the very least, assistance (if not direction) from the White House in that regard.

<sup>2</sup>*Defendants' Motion and Memorandum to Require Plaintiffs' Compliance with Court's Orders Concerning "Attachment C,"* filed May 1, 2003 (Norton's Motion").

Compliance with [the] Court's Order," in actuality, Norton asks this Court to issue a separate order mandating that plaintiffs return to the bottle a genie defendants themselves are responsible for letting out.

The record in this case underscores the fanciful nature of defendants' request and why Norton's Motion is wholly without merit and should be denied. Specifically, on August 8, 2002, the Court Monitor filed a report with this Court entitled, *Special Report of the Court Monitor on Potential Evidence Regarding the Alleged Suppression by White House and Department of Justice Attorneys of the Written Testimony of the Special Trustee Prepared for the Senate Committee on Indian Affairs' July 25, 2002 Hearing Regarding the Department of the Interior's Historical Accounting* ("Special Report").<sup>3</sup> Therein the Monitor stated:

[T]he Special Trustee not only stated to the press that he was forced to leave his position by the Secretary who told him that he would be fired if he did not resign but also that he was told by White House and Department of Justice (DOJ) attorneys that he could not submit his drafted written testimony to the Senate Committee on Indian Affairs regarding his opinions concerning the conduct of an historical accounting for the Individual Indian Money accounts as presented to Congress in the Department of the Interior's (DOI) *Report to Congress on the Historical Accounting of Individual Indian Money Accounts* (Report), submitted to this Court on July 2, 2002.

*Id.* at 2 (emphasis added). The Monitor described Attachment C as follows: "[Attachment C] pertain[s] to Mr. Slonaker's statements surrounding the alleged actions of the White House and Department of Justice attorneys in striking and suppressing the written testimony of the Special Trustee prepared by him for submission to the Senate Committee on Indian Affairs containing his opinions about the DOI's planned historical accounting as addressed in their Report." *Id.* at 3 (emphasis added).

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<sup>3</sup>The Attachment C Special Report has never been sealed and Norton has never sought to have that report sealed or stricken from the record in this case. Most significantly, there is no legitimate justification for shielding this information from public view, particularly since the fitness and credibility of Norton, Griles, Cason, and Swimmer are issues central to the accounting that each of the three branches of the United States government owes to the *Cobell* class as well as the receivership that must be established to rehabilitate the Individual Indian Trust. And, Attachment C information is additional evidence of their unfitness and untrustworthiness.

It is important to bear in mind that the Special Report was not filed under seal and it remains properly in the public record of this litigation. Moreover, the Monitor's Special Report was widely reported and the events surrounding the apparent White House ouster of former-Special Trustee Slonaker in retaliation for his honest assessment of Norton's woefully inadequate accounting plan and the contents of Attachment C have been widely reported by the press, including – *The Wall Street Journal*,<sup>4</sup> the *Associated Press*,<sup>5</sup> the *Denver Post*<sup>6</sup> and <http://indianz.com>.<sup>7</sup> In short, because of defendants' failure to take the necessary precautions to protect their material,<sup>8</sup> for which Norton belatedly had asserted privilege (e.g., only asserting such claim after permitting present and former employees to discuss this type of information publicly and otherwise in the press and after encouraging her employees to provide such information to the

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<sup>4</sup>"Interior Aide Says He Was Forced To Quit Indian Trust-Fund Probe," *Wall Street Street Journal*, July 30, 2002 ("He said he was given a letter of resignation to sign during a meeting with Ms. Norton and Deputy Secretary Steven Griles Tuesday afternoon.").

<sup>5</sup>"Interior Aide Says He Was Forced To Quit Indian Trust-Fund Probe," *Wall Street Street Journal* (citing the *Associated Press*), July 30, 2002 ("Last week, White House counsel and Justice Department attorneys urged Mr. Slonaker not to submit prepared testimony to a Senate Indian Affairs Committee hearing in which he challenged the department's plans to account for lost Indian money.") (emphasis added).

<sup>6</sup>"Indian trust supervisor resigns under pressure: Slonaker was increasingly critical of Interior's handling of accounts." *Denver Post*, July 31, 2002 ("I was forced out," quoting Slonaker).

<sup>7</sup> "He told Indianz.Com in an interview that Norton, Griles and Brian Waidmann, Norton's chief of staff, took part in a Tuesday afternoon meeting when the bad news was given. 'I was asked to leave,' Slonaker said. The blunt directive occurred just days after Slonaker bristled with Department of Justice and White House attorneys over testimony he was to provide to Congress. The Indian committee sought his views on the Bush administration's proposal to account for fund (sic) owed to more than 500,000 Indian beneficiaries. **"They took exception to what a lot of what I was planning to say in the written testimony," he said of the government attorneys. "Two thirds of the document was stricken. I think Justice may take a pretty strict view of what can help or harm their case, he said."** *Id.* at 1-2.

<http://indianz.com>, August 5, 2002 (emphasis in original).

<sup>8</sup>Nowhere does the Monitor in his Special Report describe with specificity how he obtained Attachment C. What is clear, however, is that Norton, herself, explicitly opened the door for the Monitor to meet with Department of Interior employees *ex parte*, presumably hoping to further dupe this Court since such meetings would be without the participation of plaintiffs' counsel.

Monitor without instructions on the handling of information that incriminates, and is adverse to, the interests of the Secretary and the White House), the material has been, and continues to be, part of the public record of this case. The bell cannot be unrung.

Nevertheless, Norton's Motion asks this Court to order plaintiffs to remove from the <http://www.indiantrust.com/> website two documents filed in this case which Norton contends reference Attachment C and, further, Norton has requested that this Court order plaintiffs to return all copies of Attachment C. One fundamental problem with Norton's requests is that they fly in the face of reality. The material Norton asks this Court to order removed from the website discusses Attachment C in far more general terms than either the Special Report or the media reports cited supra – all of which are part of the public record anyway. Put another way, Norton points to not a single shred of information that she wants plaintiffs to remove that is not now very public. Certainly, there is no possible legitimate rationale for proscribing plaintiffs from placing on a website, material already on the public record. What sense does it make to prohibit plaintiffs from publishing a document of their own creation which contains the same information discussed widely in articles available in the same medium? Moreover, any such prohibition is clearly constitutionally infirm, as violative of plaintiffs' First Amendment free speech rights. Parenthetically, not even Norton or her defense counsel has the audacity to represent that the information on the website is untrue.

Furthermore, Norton's charge that plaintiffs have "flouted" the Court's April 11, 2003 Order is baseless. Norton's Motion at 3. Norton cites the following three provisions of the Order as the authority for of her frivolous accusation:

ORDERED that the references by plaintiffs' counsel Dennis Gingold to the contents of Attachment C be stricken from the record of the November 5, 2002 hearing in the present case.

\* \* \*

ORDERED that references to the contents of Attachment C in plaintiffs' second reply in support of the public disclosure of Attachment C shall be stricken from the record of this case.

\* \* \*

ORDERED that section IV(5) of plaintiffs' response to defendants' historical accounting plan for individual Indian money accounts and section IV.E of plaintiffs' motion for order to show cause why Interior defendants and Bert T. Edwards should not be held in civil and criminal contempt shall be stricken from the record in this case.

*Cobell*, 257 F. Supp.2d at 206 (emphasis added) (*quoted in* Defendants' Motion at 2). It is self-evident that these provisions address matters solely on the Court record and mandate nothing in regard to material on any website. Norton makes an unjustified leap by reading into these orders an *additional mandate* – that plaintiffs strike from public view material Norton alleges is similar to material stricken from the record. However, that the Court -- for whatever reason -- strikes from consideration certain material from the case record is a far narrower action than limiting the free speech rights of parties in a public form, particularly when the statements are true and had been widely publicized. Contrary to Norton's suggestion, the Court did not order plaintiff to take any such action. And no order is justified because, as shown above, the material plaintiffs discuss is true and merely restates what is already public – through *inter alia* public statements of the former Special Trustee and news accounts of the Special Report.

Norton's Motion – which is no more than a desperate attempt to prevent plaintiffs from restating the truth about her continuing deception and other breaches of trust, as well as White House involvement in the firing of the former Special Trustee – fails on its own illogic. In essence, she asks this Court to require that plaintiffs hide from further public scrutiny evidence of her misconduct – facts that have been disseminated widely in numerous news articles across the country and is available throughout the world every day on the internet. There is no legitimate justification for such extraordinary and unconstitutional action.

Accordingly, Norton's Motion is an utter waste of this Court's and plaintiffs' resources and time and plaintiffs' respectfully request that it be denied with prejudice.

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Respectfully submitted,



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August 18, 2003

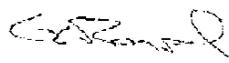
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing PLAINTIFFS' OPPOSITION TO INTERIOR DEFENDANTS' MOTION AND MEMORANDUM TO REQUIRE PLAINTIFFS' COMPLIANCE WITH COURT'S ORDERS CONCERNING "ATTACHMENT C" was served on the following by facsimile, pursuant to agreement, on this day, August 18, 2003.

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Geoffrey M. Rempel

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*The Associated Press State & Local Wire July 30, 2002*

The Associated Press State & Local Wire

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**July 30, 2002, Tuesday, BC cycle**

**SECTION:** State and Regional; Washington Dateline

**LENGTH:** 663 words

**HEADLINE:** Top **Interior** official ousted; efforts to reform Indian accounts stymied

**BYLINE:** By ROBERT GEHRKE, Associated Press Writer

**DATELINE:** WASHINGTON

**BODY:**

A top **Interior** Department official said he was forced to quit Tuesday because he challenged the department's claims that it is repairing a historically mismanaged trust fund for American Indians.

Special Trustee Thomas **Slonaker**, whose position was created by Congress to provide independent oversight for the overhaul of the fund and to report back to lawmakers, submitted his resignation Tuesday to **Interior** Secretary Gale Norton.

"I was given the choice of resigning or being fired," **Slonaker** said in an interview. "Things have not been going well in terms of trust reform, but it's not always the message they want to hear."

**Slonaker** has clashed with Norton and department officials, offering testimony in court and before Congress that contradicted assertions of progress toward fixing the century-old trust fund designed to manage oil, gas, mining and timber royalties from Indian land.

A history of mismanagement has resulted in the loss of an unknown amount of money. Attorneys for Indians who sued the government say at least \$10 million is owed to more than 300,000 Indian landowners.

Last week, White House counsel and Justice Department attorneys urged **Slonaker** not to submit prepared testimony to a Senate Indian Affairs Committee hearing in which he challenged the department's plans to account for lost Indian money.

The department has told Congress it will take \$2.5 billion and 10 years to conduct a full accounting, but **Slonaker** said a complete accounting is impossible because records are missing or have been destroyed.

He said he was given a letter of resignation to sign during a meeting with Norton and Deputy Secretary Steven Griles Tuesday afternoon.

Norton appointed Donna Erwin, the No. 3 official in **Slonaker's** office, as a temporary replacement and in a statement thanked **Slonaker** for his service. **Interior** Department spokesman Eric Ruff would not comment on **Slonaker's** claims.

Sen. John McCain, R-Ariz., said he was disappointed by **Slonaker's** resignation and the administration's refusal to give him real authority.

"Mr. **Slonaker's** resignation is just one more signal that legislation is clearly necessary to cause reform to the **Interior** Department's management of Indian trust funds," McCain said in a statement.

During a hearing Tuesday before the Senate Indian Affairs Committee, American Indian leaders said they won't back down on demands that an independent commission supervise the **Interior** Department's management of \$1 billion a year in royalties from Indian land.

Tribal leaders want the commission to have the power to subpoena documents, audit the department's accounting of the royalties and impose fines against the **interior** secretary to repair a history of mismanagement that has squandered an unknown amount of money.

An independent commission is essential to fixing management problems and is not negotiable, said Tex Hall, co-chairman of the task force and president of the National Congress of American Indians.

Griles said the department has constitutional concerns about creating an independent commission with oversight of a cabinet secretary.

The impasse probably means legislation meant to fix the historically mismanaged trust fund won't pass Congress by the end of the year.

The Indian leaders and the Department have agreed to creating a new undersecretary for Indian affairs and an official in charge of trust fund accountability above the deputy secretary now in charge of the Bureau of Indian Affairs.

The government has managed proceeds from Indian tribal land since 1820 and for individual Indians since 1887. Today it controls 45 million acres of land belonging to 315 tribes and 11 million acres for more than 300,000 individual Indians. The lands generate more than \$1 billion annually.

On the Net: **Interior** Department: <http://www.doi.gov>

National Congress of American Indians: <http://www.ncai.org>

Indian plaintiffs: <http://www.indiantrust.com>

**LOAD-DATE:** July 31, 2002

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