STATEMENT OF
JAMES CASON
ASSOCIATE DEPUTY SECRETARY
DEPARTMENT OF THE INTERIOR
BEFORE THE SENATE COMMITTEE ON INDIAN AFFAIRS
FOR THE OVERSIGHT HEARING RELATING TO
THE INDIAN TRUST FUND LAWSUIT

JULY 30, 2003

Mr. Chairman, thank you for the opportunity to testify today on the issues surrounding the longstanding case that originated in 1996 as *Cobell v. Babbitt* and is now *Cobell v. Norton*. In your letter of invitation, you expressed an interest in exploring resolutions to the case that are creative, fair, and expedient.

As you know, the Department of the Interior manages about 1,400 tribal accounts and over 225,000 individual Indian money (IIM) accounts. Because the *Cobell* case only involves IIM accounts, most of my testimony will focus on the issues related to the management of those accounts. The Committee should be aware, however, that 16 tribes have filed lawsuits seeking an accounting.

Challenges

The challenges in crafting an appropriate settlement to this lawsuit are unique. First, any settlement must address the concerns of the IIM account holders in this case. The plaintiffs in *Cobell* filed the case specifically seeking an accounting. They do not purport to seek an award of any money damages in Court. If Congress wants to address the issues associated with an accounting, Congress can clarify its intent with respect to the accounting requirement in the American Indian Trust Fund Management Reform Act of 1994.

By what we know to date, an historical accounting will cost, at a minimum, several hundred millions of dollars and take years to complete. Concerns have been expressed by your

Committee and others that none of this money will go to Indian people. Instead, it will be spent primarily on accountants and consulting firms. As I point out later in my statement, there was no discussion of accounting costs when the 1994 Act was passed. Finally, at the end of the accounting, many individuals may see very little, if any, additional money in their accounts. Given media and other statements claiming up to $176 billion are owed the IIM account holders, the *Cobell* plaintiffs and many of the individuals they represent are unlikely to be satisfied with the results of any accounting.

Moreover, when looking at our future accounting activities, Congress must recognize that the guidelines it sets for management of the trust must be achievable or we will be in a constant state of litigation. Your Committee and Congress should ask itself:

- Is it Congress' expectation that this trust will be managed like a commercial trust?
- If so, is Congress willing to provide the funding to provide beneficiaries with such a system?
- Can that system be managed in the Bureau of Indian Affairs (BIA)?
- Can we compact or contract out to beneficiaries (Tribes) to operate that kind of a system?
- Should taxpayers' money, coming from the Indian budget through the appropriations process, be spent managing accounts that have very little money flowing through them?

These are important questions for the legislative branch. The Individual Indian trust is a creation of Congress through various statutes, including the General Allotment Act of 1887, the Indian Reorganization Act of 1934, and the Act of June 24, 1938, authorizing the deposit and investment of Indian monies. The 1994 Reform Act was intended to further define the Department's obligations. Private banks avoid situations such as the one we face now by charging maintenance fees and liquidating small accounts.

In our case, small accounts never close, and the Department ends up spending significant sums managing small accounts and small land interests. It is not unusual for the cost of managing these interests to far exceed the value of the interests. Funding for these activities is made available by Congress each year in the Interior appropriations act, and must compete for budgetary resources against other program and project priorities during the annual appropriations process.

The Tribes have argued that strict trust standards, which would apply to Interior's trust operations, to be included in any trust legislation. If Congress chooses to consider such standards for the future, the Committee must consider what these standards will mean for the Individual and tribal beneficiaries, the BIA, the Office of the Special Trustee, the Department, and the American taxpayers. If Congress wants to impose new standards, it must provide clarity regarding the roles and responsibilities of the Department. Most importantly, the Authorizers and Appropriators together must ensure that the Department has the needed funds to meet these roles and responsibilities. How will Congress ensure that the needed funding is available to the Secretary if new standards are adopted? If Congress provides that the common law trust standards applicable to private trustees are applicable to the United States as trustee for Individual and tribal accounts, is it prepared to require that Native American interests be given preference over all other responsibilities of the Federal Government – e.g., allocation of taxpayer dollars and other scarce resources, national security, etc.?

Alternatively, the plaintiffs have argued that a receiver should take over. At the trial, their expert witness testified that BIA employees engaged in trust operations "would all have been replaced" if operations were moved "lock, stock and barrel into a GSE."

During this administration, the senior leadership of the Department has spent more time on this issue than any other. We are committed to trust improvement. Our employees, however, are wearing down over the strain of the contentiousness and tension associated with this single case.

Past Congressional Actions

Over the past 100 years, Congress has reviewed the issue of Indian trust management many times. In 1934, the Commissioner of Indian Affairs cautioned Congress that fractionated interests in individual Indian trust lands cost large sums of money to administer, and left Indian heirs unable to control their own land: "Such has been the record, and such it will be unless the government, in impatience or despair, shall summarily retreat from a hopeless situation, abandoning the victims of its allotment system. The alternative will be to apply a constructive remedy as proposed by the present Bill." The bill under discussion at that time, ultimately led to the Act of June 18, 1934, the Indian Reorganization Act, which attempted to resolve the problems related to fractionation. We now know it did not do so.

In 1984, a Price Waterhouse report laid out a list of procedures needed to make management of these funds consistent with commercial trust practices. One of these recommendations was to consider a shift of the BIA disbursement activities to a commercial bank. This recommendation set in motion a political debate on whether to take such an action. Congress stepped in and required BIA to reconcile and audit all Indian trust accounts prior to any transfer of responsibility to a third party. BIA contracted with Arthur Andersen to prepare a report on what would be required in an audit of all trust funds managed by BIA in 1988. Arthur Andersen's report stated it could audit the trust funds in general, but it could not provide verification of each individual transaction.

In 1992, the House Committee on Government Operations filed a report entitled "'Misplaced Trust: the Bureau of Indian Affairs' Management of the Indian Trust Fund.'" That report listed the many weaknesses in the BIA management of Indian trust funds. It pointed out that the General Accounting Office's audits of 1928, 1952, and 1955, as well as 30 Inspector General reports since 1982 found fault with management of the system. The report noted that Arthur Andersen's 1988 and 1989 financial audits stated that "some of these weaknesses are as pervasive and fundamental as to render the accounting systems unreliable."

Arthur Andersen stated it might cost as much as $281 million to $390 million in 1992 dollars to audit the IIM accounts at the then 93 BIA agency and field offices. The 1992 Government Operations Committee report describes the Committee's reaction:

> "Obviously, it makes little sense to spend so much when there was only $440 million deposited in the IIM trust fund for account holders as of September 30, 1991. Given that cost and time have become formidable obstacles to completing a full and accurate accounting of the Indian trust fund, it may be necessary to review a range of sampling techniques and other alternatives before proceeding with a full accounting of all 300,000 accounts in the Indian trust fund. However, it remains imperative that as complete an audit and reconciliation as practicable must be undertaken."

The Committee report then moved on to the issue of fractionated heirships. The report noted that in 1955 a GAO audit recommended a number of solutions including eliminating BIA involvement in income distribution by requiring lessees to make payments directly to Indian lessors, allowing BIA to transfer maintenance of IIM accounts to commercial banks, or imposing a fee for BIA services to IIM accountholders. The report stated the Committee's concern that BIA was spending a great deal of taxpayers' money administering and maintaining tens of thousands of minuscule ownership interests and maintaining thousands of IIM trust fund accounts with little or no activity, and with balances of less than $50.

On April 22, 1993, the late Congressman Synar introduced H.R. 1846. On May 7, 1993, Senator Inouye introduced an identical version, S. 925. It was in these bills that Congress first included a statutory responsibility to account for Indian trust funds. Section 501 was entitled "Responsibility of Secretary to Account for the Daily and Annual Balances of Indian Trust Funds." Senator Inouye's bill included an effective date provision that stated:

> "This section shall take effect October 1, 1993, but shall only apply with respect to earnings and losses occurring on or after October 1, 1993, on funds held in trust by the United States for the benefit of an Indian tribe or an individual Indian."

The Senate Committee on Indian Affairs held a hearing on S. 925 on June 22, 1993. Eloise Cobell in her capacity as Chairman of the Intertribal Monitoring Association testified in strong support of the bill. The only amendment Ms. Cobell recommended in her oral statement, as well as her written statement, was to allow Tribes to transfer money back into a BIA-managed trust fund at any time if they so wanted. Ms. Cobell mentioned "[W]e have amendments, and we are willing to work with the committee on these particular amendments. I am not going to devote any more of my time in my oral presentation to the provisions of the bill because we feel it is an excellent bill."

The Navajo Nation and the Red Lake Band of Chippewa Indians were the only tribes to submit testimony. They supported the bill, and did not object to the prospective application of the accounting section in their testimony.

The Director of Planning and Reporting of the General Accounting Office also testified. He was asked if he agreed with the Arthur Andersen estimates I mentioned above. He stated the following:

> "In my statement I talked about how there are a lot of these accounts that maybe you don't want to audit, that maybe what you want to do is come to some agreement with the individual account holder as to what the amount would be, and make a settlement on it. We had a report issued last year that suggested that, primarily because there are an awful lot of these accounts that have very small amounts in terms of the transactions that flow in and out of them. Just to give you some gross figures, 95 percent of the transactions are under $500. One of our reports said there that about 80 percent of the transactions are under $50. So in cases where you have the small ones, maybe there's a way in which we can reach

> agreement with the account holders and the Department of the Interior on how much we will settle for on these accounts rather than trying to go back through many many years, reconstructing land records and trying to find all of the supporting material. It may not be worth it." [page 29 of S. Hrg 103-225]

On July 26, 1994, Congressman Richardson introduced H.R. 4833, which ultimately became the American Indian Trust Fund Management Reform Act of 1994. The House report on H.R. 4833 notes that H. R. 1846 was the predecessor bill to H.R. 4833. There was one legislative hearing held on H.R. 4833 by the House Committee on Interior and Insular Affairs on August 11, 1994. There is no printed record of that hearing. There was no Senate hearing or report on this bill.

H.R. 1846 and H.R. 4833 were similar in many places. H.R. 4833 did not, however, include the effective date provision explicitly making the accounting requirement prospective only. While the report notes in a number of places why changes were made to the H.R. 1846 provisions, it is silent with respect to this omission.

It may surprise Members of this Committee to note that there is no mention of the costs associated with either complying with the Act, or completing the accounting in the Committee's report. Moreover, no analysis from the Congressional Budget Office was included in the House Committee's report. The Department sent a letter on H.R. 1846 and amended S. 925 that was placed in the Committee report on H.R. 4833. Its only mention of cost is the following sentence: "We wish to note that, given current fiscal restraints, the funding for implementation of this legislation may necessarily have to be derived from reallocation of funds from other BIA or Department programs." Given the lack of cost analysis contained in the legislative history, one could assume that Congress in enacting the 1994 Reform Act had no idea it may have required a multi-million or billion dollar accounting.

Interior's Historical Accounting Plan

The *Cobell* court ruled that the 1994 Reform Act requires the Department to provide IIM trust beneficiaries an accounting for all funds held in trust by the United States that are deposited or

invested pursuant to the Act of June 24, 1938, regardless of when they were deposited. The Court of Appeals noted that the statute does not make clear how to conduct such an accounting, and it is properly left up to the Department what accounting methods to use.

In the Department's FY 2001 Appropriations Act, Congress directed the Department to submit a comprehensive report to the Appropriations Committees as to the costs and benefits of a comprehensive historical accounting. That report was submitted on July 2, 2002. It looked at the costs associated with doing a transaction-by-transaction accounting and transaction-by-transaction verification for the IIM account holders. The estimate for such an accounting and verification was $2.4 billion, and that would take ten years to complete. The feedback received from various Congressional members and staff suggested little support for this plan given its cost, the length of time required, and the fact that such a huge sum of money would go to accountants and lawyers, not Indian people.

In September 2002, Judge Lamberth ordered the Department to submit to the court by January 6, 2003 a proposed historical accounting plan. He also allowed the plaintiffs in the case to submit their own proposed accounting plan.

Our proposal is to compile a transaction-by-transaction accounting with transaction verification based in part on various statistical sampling verification methods. But all IIM account holders will receive transaction-by-transaction account histories. By using these different methods, we believe IIM account holders will receive their accountings much sooner. Interior plans to separate the historical accounting into three distinct types of IIM accounts.

- Judgment and Per Capita accounts
- Land-based IIM accounts
- Special Deposit Accounts

For the approximately 42,200 judgment and per capita accounts, we plan to reconcile 100 percent of the transactions in each account and verify all transactions.

For the approximately 200,000 land-based IIM accounts, we intend to provide a complete transaction-by-transaction history going back to the Act of June 24, 1938, or the date of inception of the account and verify those transactions using a combination of transaction-by-transaction and statistical methods. We plan to verify all transactions that are equal to or greater than $5,000. For transactions that are less than $5,000, we will verify transactions using statistically valid sampling technologies. The statistically valid sampling methodology is expected to result in our being able to determine the accuracy rate of the historical accounting with 99 percent confidence.

For the 21,500 Special Deposit accounts, which are in effect holding accounts, we intend to distribute the funds to the proper owners and then close those accounts.

The historical accounting described in our plan covers all IIM accounts open as of October 25, 1994, the date of the Act, or opened thereafter. The historical accounting period ends on December 31, 2000; transactions occurring thereafter are addressed in current accounting activities. Interior engaged 14 consulting firms to assist in the development of this plan, including five accounting firms (four of which are among the five largest firms in the United States), the largest commercial trust operator in the United States, two historian firms that have specialized in Indian issues for many years, and firms to assist in statistical matters, trust legal matters and other areas pertaining to historical accounting.

Under our plan, at the end of the Department's proposed historical accounting process, we intend to be in the position to provide each IIM account holder with a Historical Statement of Account. This statement will provide information on how much money was credited to each account, and the disbursements made from the account. It is expected to provide an assessment of the accuracy of the account transaction history. In addition, we intend to be in a position to provide land-based IIM account holders with information regarding their land assets. This information will be prepared by the BIA Land Title and Records Offices as a separate package to be provided to IIM account holders.

The cost of our historical accounting plan is approximately $335 million over five years. The President's proposed FY 2004 budget for the Department of the Interior includes money for this accounting. Our $9.8 billion budget request is the largest in the Department's history, and represents a net increase of $344.1 million over the FY 2003 enacted appropriations. Nearly one-half of the proposed increases will fund trust reform improvements. Included within the total, is $100 million to support the Department's plan to conduct an historical accounting for IIM accounts and $30 million to account for funds in tribal accounts.

The court has not yet ruled as to whether it believes our accounting plan is adequate. Plaintiffs have argued vehemently that it is not. Plaintiffs argue that the 1994 Reform Act requires a full verification for all transactions since the 1880s, and that such an accounting is "impossible" because the historical records are not complete – something Congress was obviously aware of when it passed the 1994 Reform Act. In the trial, plaintiffs have offered an alternative methodology, which uses various estimating techniques to approximate the amount they contend should have come into the IIM accounts since the 1880s. Their plan will, admittedly, not provide an accounting to even one IIM beneficiary, but will – like a damages model – come up with an amount of money to which plaintiffs as a class claim they are entitled.

Indian country argues that the money for this accounting or any judicial or congressional settlement should all be new money and not come from Indian program money. In reality, appropriators are faced with funding this accounting out of the Interior allocation, and have openly stated that funding a multi-million, potentially multi-billion, dollar accounting will mean a reduction in money for other Indian program priorities.

Interior Trust Reform Efforts

The Department has developed a comprehensive plan for the management of Indian trust funds. The Secretary established both the Office of Historical Trust Accounting and the Office of Indian Trust Transition. The Office of Indian Trust Transition engaged in a meticulous process to develop an accurate, current state model to document trust business processes. The Department,

after the most extensive consultation ever held with Indian country, is well down the road of putting in place a reorganization of trust functions in response to widespread criticism of the former trust management structure.

Previous Settlement Attempts in this Case

Mr. Chairman, recently you and Senator Inouye sent letters to the parties urging a fair and equitable settlement of the *Cobell* case. We welcome your involvement in this dialogue. We also welcome such a settlement. However, the parties are far apart on the issue of what is fair and equitable. Although I did not work at the Department of the Interior during the previous administration, I understand that, despite assertions of the plaintiffs, the Federal Government has made a number of efforts to engage in settlement talks in *Cobell* with no success. From June 1996 to July 1997, the Department engaged in negotiations with the *Cobell* plaintiffs on the issue of development of an acceptable accounting mechanism. The Department tried again in early 1999 before the July 1999 trial and again right before the trial. Those negotiations failed.

After the July 1999 trial, Judge Lamberth asked the parties to work toward a settlement. The parties were unable to agree on an acceptable mediator, so the Judge appointed Stephen Saltzburg, a professor at George Washington University who has served as a special master in two class action cases in the District of Columbia District Court, and serves as a mediator for the U.S. Court of Appeals for the District of Columbia. The mediation ended with no resolution in November 1999.

Near the end of the previous Administration, then Special Trustee Tom Slonaker talked directly to plaintiffs' attorneys. While agreement was reached on a number of issues, other overarching issues went unresolved, and ultimately this effort failed. At the beginning of this Administration, the Department once again tried to enter into settlement talks in *Cobell.* The discussions became mired in a variety of issues surrounding the conduct of the negotiations. No resolution was reached on those issues.

Last year, the House Appropriations Subcommittee on Interior included language in the Interior FY 2003 appropriations bill that would have limited the historical accounting to the period from 1985 forward. That language was removed by amendment on the House floor. The debate on that amendment, which was more extensive than the debate on the actual 1994 Reform Act, centered on the point that this matter should be addressed by the authorizers, not the appropriators.

The appropriators urged the authorizing committees to step in and come up with a legislative settlement. Congressman Dicks explained on the House floor that it was the intent of the appropriators to try to resolve this issue so that the vast amounts of money involved could go to Indian programs instead of accountants. More precisely he said:

> "This thing is broken; and somehow all the people that are here today expressing their wonderful concern, there is going to be a tomorrow, and we will see if anybody really wants to stand up with the majority side obviously having to be involved and work on this. This has to be done. We have got to get something done here." And then later in the debate, "What we are trying to do is get them money in a reasonable period of time without decimating the Interior appropriations bill every single year. I want that $143 million to be used for other programs that will help Native Americans. I do not want to waste $1 billion in going out and trying to do accounting that is not going to give us the information pre-1985."

He also invited the authorizers to develop a settlement compromise -- "[N]ow if these gentlemen who have come to the floor today to help us, if their committees would get busy and develop a compromise and do a settlement on this issue, it could be coming from Congress. Somehow we have to resolve this, because we do not have enough money."

The House authorizers who spoke on the floor in July 2002 all stated their beliefs that settlement language should come from the authorizing committees, not the Appropriations Committee.

Over a year has passed since that debate in the House. We are now facing another appropriations cycle, and there has been no movement toward a settlement of the *Cobell* case. During that year, the court has issued a ruling and required plans for a historical accounting to be submitted; we have developed a plan for our accounting and are moving forward with our trust reform plan. A 44-day trial was recently completed on our accounting plan, plaintiffs' "accounting plan," our plan to bring ourselves into compliance with our fiduciary obligations, and plaintiffs' compliance plan.

Both the House and Senate Appropriations Committees have provided in their FY 2004 bills $55 million less for a historical accounting than we requested in our FY 2004 budget. The House bill, as reported from Committee, also included language requiring the Secretary to develop a voluntary settlement program, and required that statistical sampling be used in conducting the historical accounting required by the 1994 Trust Reform Act. That language was removed at the request of the House authorizers.

On April 20, 2003, Eloise Cobell sent a letter to all class members in the *Cobell* case. Ms. Cobell urged them not to support any effort by Congress to authorize a voluntary settlement for their accounting claims. Ms. Cobell told them, many of whom own a minute share in one parcel of land and accounts with throughputs under $15 annually, that the plaintiffs are about to receive "a huge many billion dollar judgment in favor of us — all Indian trust beneficiaries." The letter also said if the voluntary program is enacted, "tens of thousands of Indian people will again be cheated by the United States government." Plaintiffs' attorneys have stated they expect to receive up to $176 billion.

As a result, expectations are high in Indian country. Given what we have seen as a result of the reconciliations and accountings done so far, we do not believe we can justify to the American taxpayers a settlement offer in the billions of dollars.

Mr. Chairman, on June 13, 2003, both you and Senator Inouye sent a letter to Tribal leaders asking for their help in tackling 3 major tasks that would improve the management of Indian trust:

- Stop the continuing fractionation of Indian lands and focus on the core problems of Indian probate by swiftly enacting legal reforms to the Indian probate statute.
- Begin an intense effort to reconsolidate the Indian land base by buying small parcels of fractionated land and returning them to tribal ownership.
- Explore "creative, equitable, and expedient ways to settle the *Cobell v. Norton* lawsuit."

We would like to work with you and the House Committee on Resources on all three of these tasks. Addressing the rapidly increasing fractionation on Indian land is critical to improving management of trust assets. Properly done probate reform could be very helpful. When land is leased, BIA has the responsibility to deposit receipts from the land into the appropriate IIM account. This involves probating estates, finding heirs, and holding money for unknown heirs. These tasks are all funded through the Department's budget.

The purchase of fractional interests increases the likelihood of more productive economic use of the land, reduces recordkeeping and large numbers of small dollar financial transactions, and decreases the number of interests subject to probate. The BIA has conducted a pilot fractionated interest purchase program in the Midwest Region since 1999. Through FY 2002, the program has acquired 47,188 ownership interests in over 25,000 acres.

We have learned there is a high level of interest and voluntary participation by willing sellers and large numbers of owners are willing to sell their fractionated ownership interests. The President's FY 2004 budget request proposes $21.0 million for Indian land consolidation, an increase of $13.0 million for a nationally coordinated and targeted purchase program. Interior believes that a national purchase program can be administered in a very cost-effective manner to target acquisitions that reduce future costs in trust management functions, such as managing land

title records, administering land leases, distributing lease payments to IIM accounts, and processing probate actions. We are developing a strategic plan and necessary infrastructure to support a major expansion of this program in 2004. Where appropriate and to the extent feasible, the Department plans to enter into agreements with Tribes or tribal or private entities to carry out aspects of the land acquisition program.

With respect to the third task, the settlement of the Cobell lawsuit, I can honestly say I don't think we can get there without the involvement of Congress. This does not mean we will not continue to try. Contrary to Ms. Cobell's letter to the class members, this case is not on the verge of being over. Even if the district court were to adopt the plaintiffs' accounting plan -- which the Administration argues is fundamentally improper given that this is a lawsuit ostensibly brought under the Administrative Procedure Act -- there are more steps before the district court, and before other tribunals, that will be required before the class members receive any money. The district court has said that it does not have the jurisdiction to compel payment of money damages. It has made clear that the reason it, rather than the Court of Federal Claims, can hear the case is that the plaintiffs have stated many times that they are not seeking money damages. Without a settlement, considerable hurdles remain before anyone other than the lawyers or accountants can see any money from this suit.

Circuit Court Opinion

On July 18, 2003, the D.C. Circuit Court of Appeals found the district court in *Cobell* erred when it held Secretary Norton and Assistant Secretary McCaleb in contempt last September. The Circuit Court also ruled that the district court erred when it reappointed Joseph Kieffer as Court Monitor in April 2002 over the objections of the Department, and that the district court compounded this error by elevating him to "Special Master-Monitor" in its September ruling. The July 18 opinion states:

> "The Monitor's portfolio was truly extraordinary; instead of resolving disputes brought to him by parties, he became something like a party himself. The

> Monitor was charged with an investigative, quasi-inquisitorial, quasi-prosecutorial role that is unknown to our adversarial legal system. . .” [page 17]

The Circuit Court went on to address the contempt citations by pointing out that “a sanction for one’s past failure to comply with an order is criminal in nature” [p. 25] and that “one person cannot be held criminally liable for the conduct of another. We further note that a finding of criminal contempt ‘requires both a contemptuous act, and a wrongful state of mind.’ [p.26] Assistant Secretary McCaleb’s contempt charges were deemed in error because the district court did not identify “any specific act or omission whatsoever on his part.”

Secretary Norton’s contempt charges were found to be in error for a number of reasons. First, the district court said the Secretary committed “litigation misconduct” because she failed between December 21, 1999 and July 10, 2001 to take any steps toward completing an accounting. The Circuit Court pointed out that more than a year of this period was not on her watch, and that “the district court’s findings clearly indicate that in her first six months in office Secretary Norton took significant steps toward completing an accounting.” [p. 27]

The district court also held the Secretary in contempt for committing a fraud on the court. This “fraud” was for “filing false and misleading quarterly status reports starting March 2000, regarding TAAMS and BIA Data Cleanup.” *Contempt Opinion* 226 F. Supp. 2d at 124. Four were filed prior to the Secretary taking office, and, according to the Circuit Court, the remaining four “do not rise to the level of fraud on the court.” [p. 28] In fact the Circuit Court stated “[W]e find the reasoning of the district court mystifying” with regard to this holding.

Finally, with respect to the district court finding that the Secretary committed a fraud on the court by making false and misleading representations regarding computer security because of representations made by the Secretary in April and May 2001, the Circuit Court stated:

> We see no finding of fact in the Report on IT Security, or in any opinion of the district court, that directly contradicts the statements in the Department’s April Opposition, which the court identified as part of a fraud on the court. Absent a direct contradiction, the facts of this case do not support the implicit inference that Secretary Norton “has acted with an intent to deceive or defraud the court.”

> *United States v. Buck*, 281 F. #d 1336, 1342 (10th Cir. 2002). With respect to the statement in the Department's May Opposition, we think it is inconceivable that a departmental secretary may be held to have committed a fraud on the court because an attorney representing her Department argued in an adversarial proceeding that an adversary's motion critical of the department was "without merit."

We are pleased with the findings of the Circuit Court. Much of this litigation has focused on matters that are not moving us forward with regard to trust management improvement. The Federal Government has spent a huge amount of time and money on this litigation and on issues that get us no closer to resolution of the case.

Secretary Norton and former Assistant Secretary McCaleb are not the only ones who have had to fight for their reputations as a result of this case. To date, dozens of employees and past employees of the Department of the Interior and Department of Justice have been charged with civil or criminal contempt by the plaintiffs. Plaintiffs refer to them as "Contemnors" even though not one has yet to be found in contempt of anything. As of April 30, 2003, the Department of Justice had authorized the retention of private counsel by 80 present and former officials and employees of Interior, Justice, and Treasury, in connection with this litigation. The co-workers of these individuals know them in a different way. They know many of them as dedicated civil servants who have devoted themselves to careers of public service. Many of the named individuals are attorneys who handle or have handled Indian affairs issues. Rarely do individuals give up the benefits of private practice to come to the Department and handle Indian issues unless they have some innate dedication to making the lives of Indian people better. These individuals now all must engage attorneys, and have been removed from Indian trust issues, not because the Department believes they are culpable in any way, but because we will not jeopardize them any further by keeping them on this case.

In addition, Mr. Chairman, in my opinion, the employees of the BIA are quite frankly tired of constant allegations from the plaintiffs that they are incompetent or unfit to perform their duties. As you might imagine, morale in the BIA is seriously affected by uncertainty as to what the future holds for its employees.

That concludes my prepared statement. Thank you again for giving me an opportunity to testify. I would be happy to answer any questions you might have.