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' REPLY IN SUPPORT OF MOTION TO SUPPLEMENT PLAINTIFFS' MOTION TO AMEND PLAINTIFFS' MOTION FOR ORDER TO SHOW CAUSE WHY INTERIOR DEFENDANTS AND THEIR EMPLOYEES AND COUNSEL SHOULD NOT BE HELD IN CONTEMPT FOR DESTROYING E-MAIL

I. INTRODUCTION

It is established through party admissions and other indisputable evidence that a massive and unquantifiable amount of irreplaceable trust records have been (and continue to be) systemically destroyed by the trustee-delegates and their mangers, agents, and counsel, yet they continue to insist in bad faith that "plaintiffs have not provided a shred of evidence that any trust records or BIA e-mails have been destroyed." *See* Opposition[1] at 1. The issue is not (and has never been) whether relevant e-mail and electronic trust records have been lost, destroyed, or corrupted in violation of law **and** this Court's orders at all times relevant to these proceedings. That has been proven beyond a shadow of a doubt.

Unfortunately, however, because no one has been held accountable for such malfeasance and other litigation misconduct, the spoliation continues with impunity as does the irreparable harm that plaintiffs must endure as a consequence of such misconduct. The trustee-delegates and their counsel arrogantly assert that this Court is powerless to enforce its orders against them and that it has no authority to hold those who are culpable personally accountable for their contemptible conduct. They say that they are immune from personal sanctions no matter how often they knowingly and willfully violate this Court's orders, no matter how much spoliation they have done, no matter how much harm they inflict upon individual Indian trust beneficiaries, and no matter how much they undermine the integrity of these proceedings.

What remains to be done – and must be done – is for this Court to hold accountable those who are responsible for such massive spoliation and coverup and fashion appropriate remedial, coercive, and compensatory sanctions for such malfeasance.

Further, the unabashed Norton and her manifestly unethical counsel suggest that this Court should nonetheless continue to permit their deplorable conduct to be swept under the proverbial

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[1]*Memorandum of Points and Authorities in Opposition To Plaintiffs' Motion to Supplement Motion to Amend Plaintiffs' Motion for Order to Show Cause Why Interior Defendants and Their Employees And Counsel Should Not Be Held in Contempt For Destroying E-mail (March 20, 2002)*, filed March 8, 2005 ("Opposition").

rug, and, in their arguments, they materially misrepresent the record of these proceedings and pretend that this litigation was filed yesterday. Parenthetically, Norton and her government counsel misrepresent plaintiffs' March 20, 2002 show cause motion,[2] saying that it is limited to "contempt sanctions . . . on the grounds that DOI had overwritten tapes containing backup copies of Solicitor's Office e-mails." *See* Opposition at 1. Conspicuously, they cannot and do not provide any citation or authoritative source for such gross distortion of the record.[3] Indeed, the motion speaks for itself and it is not so limited. Had Norton and her counsel read plaintiffs' original motion and the supporting thirty-nine page factual appendix – as they clearly have failed to do – even they might be able to comprehend the nature and scope of the detailed specifications that have been laid out and supported in dozens of related filings. The following may be of some assistance to them:

> The Special Master's Opinion and Recommendation for Sanctions – and the facts set forth below, as well as those detailed more fully in the Factual Appendix and the supporting exhibits attached hereto – establish that **Contemnors have destroyed relevant e-mail, e-mail back-up tapes, and other electronic records in violation of court orders, and the Federal Rules of Civil Procedure, and in conflict with explicit representations that they made repeatedly to this Court and to plaintiffs that <u>all relevant electronic records would be preserved</u>**. Further, Contemnors' bad faith and their pattern and practice of obfuscation, deceit and cover-up of the Solicitor's Office e-mail destruction and the destruction of other electronic records are identical to their bad faith and pattern and practice of obfuscation, deceit, and cover-up found by this Court when it held defendants in contempt for flagrantly violating the November 27, 1996 document production order.

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[2]*Plaintiffs' Motion for Order to Show Cause Why Interior Defendants and Their Counsel, Should Not Be Held in Contempt for Destroying E-mail.*

[3]Their bad faith strategy of obfuscation and denial is transparent. Norton and her counsel dishonestly parse and piecemeal plaintiffs' various motions, claiming disingenuously that each discrete motion "lacks specificity" and feigning incomprehension of, and confusion, about, the contempt specified and charged. As this Court may note, read together as is proper, plaintiffs' motions provide a cogent, easily understood chronicle of destruction, coverup, and other malfeasance on the part of Norton, other identified Interior officials, and named Department of Justice counsel. Such misconduct is in plain violation of this Court's orders and is calculated to undermine the integrity of these proceedings. Thus, it is also appropriate for the Chief Judge of this Court to assess whether the contemnors who are licensed to practice in this Court have sufficient character and fitness to retain their licenses. As plaintiffs' counsel stated to this Court on March 3, 2005, the government lawyers are a disgrace to this Court.

See March 20, 2002 Motion at 3 (emphasis added). To be sure, the systemic spoliation of trust records by Solicitor's Office attorneys – **trust counsel** no less – is uniquely repugnant and worthy of the most draconian sanctions – including disbarment – but plaintiffs' motion is most concerned about the irreparable harm that trust beneficiaries have been forced to suffer as a consequence of the trustee-delegates' systemic and unquantifiable destruction of electronic trust records (and its coverup) **throughout the entire department** – not just BIA and OST. Only professional liars or those who choose to ignore the massive record in these proceedings, including plaintiffs' factual appendix, would have the audacity to tell this Court that "plaintiffs have not provided a shred of evidence."[4]

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[4]For the benefit of the unfit trustee-delegates *et al.*, plaintiffs have identified individual contemnors who are known to be responsible for such spoliation and coverup in a series of bills of particulars. *See Plaintiffs' Notice in Response to the March 3, 2005 Order* at 5-6 (identifying docket numbers # 1392 1419, 1399, 1635, 1649, 1637, 1636, 1638, and 1648). In addition, plaintiffs filed their motion to amend on December 13, 2004 and, beginning on page 18 (section entitled: "Individual Contemnors Responsible for the Destruction of Irreplaceable Individual Indian Trust Records") expressly state why contemnors Steve Griles, Robert McCallum, Jr., Peter Keisler, Stuart Schiffer, Christopher Kohn, Sandra Spooner, John Stemplewicz, and John Siemietkowski should be ordered to show cause why they should not be held in contempt for their participation in the spoliation of trust records and the concealment of such destruction from this Court and plaintiffs.

Finally, plaintiffs filed their motion to supplement on February 22, 2005. Therein, plaintiffs proffer powerful evidence that Brian Burns, Hord Tipton, Pat Maloney and Brian Walsh have filed false and materially misleading certifications with this Court, knowingly or in willful disregard of the facts. Furthermore, defense counsel identified by plaintiffs aided and abetted the preparation and filing of such false and materially misleading certifications. Thus, the named Interior employees and their Department of Justice attorneys must have known that implementation of the Zantaz process had resulted in further destruction of irreplaceable trust records at the same time they prepared, executed, and filed false certifications to the contrary and averred that such trust records were being preserved when, in fact, they were not. To the extent there is any doubt – and plaintiffs believe there is none – this Court should view the destroyed email as conclusive evidence in support of plaintiffs' charges and draw adverse inferences with regard to the contemnors' intent– if this Court believes criminal contempt should proceed along with civil contempt.

Indeed, there is no lack of specificity here and those who are culpable should not be allowed to evade accountability though obfuscation and distortion. Now, this is not to say that plaintiffs' motions are necessarily complete. That is unlikely. It cannot be disputed that evidence has been destroyed. It is also indisputable that complete information has been denied to plaintiffs because of constraints on discovery that have only recently been removed and because of the inexplicable failure of the former special master to conduct the Court ordered investigation into the culpability of each contemnor. Now that discovery restrictions have been lifted, plaintiffs will – mindful of the lapsed time and the spoliation that has continued in the interim – do whatever can be done to establish the most complete record of individual culpability that is possible.

Damningly, the trustee-delegates and their counsel do **not** deny that they have destroyed e-mail and other electronic trust records – and covered-up such destruction – to undermine the integrity of these proceedings in violation of orders, statute, and regulation. Their entire defense rests on two specious claims: that plaintiffs have not met the threshold evidentiary burden required for a show cause order to be entered and, in the alternative, that even if the spoliation charges are adequately supported, this Court is powerless to sanction their spoliation and coverup because "sovereign immunity precludes the imposition of civil penalties or criminal sanctions against **individual respondents in their official capacity**." *See* Opposition at 2 (emphasis added).[5]

Such argument is notable in that the government implicitly concedes that this Court is authorized to impose civil and criminal sanctions on the trustee-delegates in their official capacities – Secretary Norton, and associate deputy secretary Cason, the mid-level Interior political appointee who currently claims the duties and responsibilities of the other named Interior defendant, the Assistant Secretary–Indian Affairs. As such, this Court, at the very least, has uncontested and unfettered authority to impose civil and criminal sanctions, including without limitation issue and evidentiary preclusion sanctions, removal, and confinement on Norton and Cason if this Court finds that they in their capacity as trustee-delegate defendants are responsible

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[5]*See also id.* at 12 ("Sovereign immunity precludes the imposition of criminal penalties or compensatory sanctions for civil contempt **against the individual respondents in their official capacities**.") (emphasis added). If the trustee-delegates view is ever adopted by any court – and it has not been – government attorneys would be licensed freely to do that which they have done, and continue to do, in these proceedings: lie; willfully destroy evidence; violate court orders, laws, and federal rules; disdain the ethical duties that they owe as officers of this Court; and otherwise aid their clients in the perpetuation of fraud – all with no consequence. This contention is so dishonest that even this government will not endorse such palpable misconduct (other than in this case). For example, the ethical rules promulgated by the Department of Justice for its lawyers require compliance with "relevant professional codes of conduct." *See, e.g.,* http://www.usdoj.gov/jmd/ethics/generale.htm & http://www.usdoj.gov/jmd/ethics/general.html. There is no waiver of ethical rules for government lawyers. Thus, contemptuous defense counsel can find no sanctuary in sovereign immunity. Further, because this Court and plaintiffs previously have addressed such dishonest claims of immunity *ad nauseam,* it would be a waste of resources to do so again. However, plaintiffs note that a recent discussion of this issue is found in their *Reply in Further Support of Motion to Amend Plaintiffs' Motion for Order to Show Cause Why Interior Defendants and Their Employees and Counsel Should Not Be Held in Contempt for Destroying E-mail* (filed January 7, 2005) at pp 18-24.

for the spoliation of electronic trust records – and its coverup – in violation of orders and law and in breach of trust.[6]

II. CLAIMS OF 'LACK OF SPECIFICITY' ARE SPECIOUS

This Court is asked to ignore the unprecedented record of contemptuous conduct in these proceedings and find that plaintiffs have not met their burden of proof sufficient for this Court to enter an order to show cause. *See* Opposition at 3 ("Plaintiffs assert repeatedly that defendants, defense counsel, or Zantaz have destroyed BIA e-mails or trust records. Plaintiffs have cited no evidentiary support for these charges.") (footnote omitted). Such arguments are particularly untenable given the mountain of incontestible evidence demonstrating contemnors' systemic spoliation of evidence – and its coverup – throughout this litigation, the willfulness of such destruction of trust records, the repeated violations of clear orders, the irreparable harm such misconduct has caused plaintiffs, and the incriminating absence of any factual rebuttal to the facts stated by plaintiffs.

For instance, consider the following carefully crafted admissions of "a problem" acknowledged by attorneys in the Department of Justice and the Office of the Solicitor vis-a-vis their understanding of the need to disclose the nature and scope of spoliation that had occurred and the fact that it was continuing:

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[6]Plaintiffs note that this Court has broad inherent authority to fashion such relief for plaintiffs as equitable remedies for such gross litigation misconduct and, in that regard, the government is a zealous advocate of the exercise of such unfettered authority. To the extent that this Court wishes to exercise its authority through contempt, it may wish to hold in abeyance the parties' comprehensive briefing of appropriate sanctions and equitable remedies until such time as proposed findings and conclusions are filed – at the close of the contempt trial(s) that have yet to be scheduled. Obviously, sanctions and equitable remedies should fit the facts found and the violations of order and law held. Thus, a full briefing of contempt sanctions at this time may be premature, particularly where, as here, remedies and sanctions for certain contemnors may vary; some surely will include confinement to coerce and ensure obedience or, in the alternative, this Court may opt for removal if coercion is found to be futile. Moreover, sanctions for other contemnors may only be remedial – *e.g.,* the payment of compensation to plaintiffs to cover the attorneys' fees and costs incurred in connection with the contemptuous conduct. Plaintiffs suggest that individual sanctions should correspond to the nature and scope of individual culpability. However, if this Court wishes to examine this issue more thoroughly prior to the filing of proposed findings and conclusions, plaintiffs would be pleased to brief the range of equitable remedies that may be fashioned by Article III courts under these circumstances.

> Charles Findlay: "[T]here appears to be a problem concerning the permanent retention of email backup tapes at BIA and that we [will] report further to you when we [have] more information."

And,

> Sabrina McCarthy: there is a "possible problem concerning the permanent retention of e-mail backup tapes at the Bureau of Indian Affairs."

See Plaintiffs' Exhibit 1 at 1 and 2, respectively. Notwithstanding their acknowledgment of this "problem" and their promise of candor, **Findlay and McCarthy broke their promise to this Court, the special master, and plaintiffs and continued to coverup the nature and scope of the "problem" referenced above**. Nonetheless, the nature and scope of the "problem," its impact on this litigation, and the resulting irreparable harm to plaintiffs is evidenced by the fact that few (if any) BIA backup tapes exist prior to 2001. *See* Factual Appendix ¶ 102. The systemic destruction of BIA e-mail backup tapes is incontestible. And, for defense counsel to now claim as they do that there is "no evidentiary support" that BIA destroyed e-mail cannot pass the straight-face test.

To be clear, the record of these proceedings is littered with irrefutable evidence of systemic e-mail destruction and the overwriting of e-mail backup tapes. *See e.g.* Factual Appendix attached to March 20, 2002 Motion. Three years have elapsed since that filing was made, yet no one has disputed a single one of the 104 paragraphs of the Factual Appendix that set forth the specific support for plaintiffs' contempt charges. Not one single paragraph has been disputed. None. Parenthetically, this is particularly notable given that plaintiffs have been so hamstrung in discovery and that so many millions of dollars have been paid to so many law firms for so many years for the sole purpose of challenging the credibility of plaintiffs' specifications and the evidence proffered in support.

To again refresh the collective recollections of amnesic defense counsel, it is **their co-counsel** who belatedly and grudgingly informed this Court and the special master that they could not preserve and protect electronic trust records including e-mail. It is their co-counsel who committed to quantify the nature and scope of the harm caused by such spoliation. However, because they could not provide a meaningful measurement of the harm caused, defense counsel

instead offered, in response to a request for information by the Special Master, to conduct an:

> audit of email preservation and backup tape retention . . . for the Solicitor's Office [and] also for the Department of the Interior **in its entirety**, including the Bureau of Indian Affairs.

See e.g. Plaintiffs' Exhibit 2 (September 26, 2001 Shyloski Letter to Special Master) at 1 (emphasis added).[7] However – three and one-half years later – **no audit has been provided to this Court or plaintiffs**.[8] Worse, the surreptitious spoliation of irreplaceable trust documents continued unabated throughout the Department of Interior – in every agency and in every field office. Ample evidence is in the record to support this finding, including uncontested evidence of chaotic, haphazard, inconsistent, and often conflicting directives (and the absence of any effective monitoring or enforcement and compliance) sent from Washington to field office employees regarding their obligation to print hard copies of all relevant e-mail and, of course, the usual lack of available backup tapes to preserve such email.[9] Put simply, the practices of Interior senior

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[7]It is noteworthy that this "audit" was memorialized through many written communications in September and October 2001.

[8]In a deposition conducted last Friday, March 25, 2005, Hord Tipton (DOI CIO) confirmed the existence of the suppressed audit:

> Q Are you aware that the Justice Department made a representation to the Special Master there would be an audited inventory?
> A I can remember some details on an audited inventory. I'm trying to think of the name of the company that did the audit.
> Q Oh, so there is an audit.
> A Of the tape.
> Q So there is one. Well, it wouldn't have been inclusive because I believe it ended before -- I believe it ended before I even became CIO.

See Plaintiffs' Exhibit 4 at Tr.111:8-18. And, although the audit could not possibly be "inclusive" or complete, it is notable that its very existence had been concealed prior to the deposition of Tipton. Plaintiffs discuss the admissions and relevance of Tipton's deposition *infra*. *See also id.* at 114:17-118:12 (discussing September 26, 2001 Shyloski Letter – Plaintiffs' Exhibit 2).

[9]*See, e.g. , Corrected Report of the Special Master Regarding the Deletion of Individual Indian Trust Information by Former Assistant Secretary-Indian Affairs Neal Mccaleb* (finding that Interior's e-mail retention policy is haphazard and results in the destruction of trust records) at 51 ("The fact remains that the Department of the Interior permitted its most senior BIA official to assume his fiduciary responsibilities without any trust training, sanctioned the use of a data recapture policy that threatened the integrity of trust information, and failed to impose a training regimen that ensured the retention and preservation of trust communications. The current state of

management and their counsel ensured the destruction of hard copy printouts of e-mail at the same time the contemnors allowed the surreptitious destruction of e-mail embedded in e-mail backup tapes to continue unabated. *See e.g.* Plaintiffs' Exhibit 3 (August 27, 2001 Goodwin e-mail to Klein):

> This litigation over Indian trust accounts is very ugly, with the plaintiffs accusing DOI of all kinds of treachery and evil. One of the issues is Departmental preservation of records, including email. The **Solicitor's Office is under an order to preserve all email backup tapes until otherwise advised**. So this office backs up all of our emails and keeps the tapes. **The current problem is our [Solicitor's Office] use of Groupwise, and the fact that the email backup tapes kept by Carol or Audrey are <u>overwritten about every month</u>. Since overwriting backup tapes destroys the material originally on the tape, <u>we are allowing our records to be destroyed through our use of Groupwise</u>**. . . . The problem is here in my office, **<u>because we use Groupwise</u>**.

Id. (emphasis added).[10] Thus, there can be no doubt that the trustee-delegates and their counsel knew that e-mail continued to be destroyed. Not only did they do nothing to stop it, they covered it up.

This background is important because it informs on their bad faith implementation of the Zantaz proposal – the trustee-delegates' contemptuous "fix" of the on-going e-mail spoliation "problem." Plaintiffs informed this Court and former special master Balaran years ago that the

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affairs can best be described as chaotic."). *See also* June 2002 Inspector General Report: *"Allegations Concerning Conduct of Department of the Interior Employees Involved in Various Aspects of the Cobell Litigation"* at 6 (emphasis added):

> **<u>[C]onfusion reigned over what was, and what was not, to be retained</u>**. The SOL thought they knew what was expected of them pursuant to internal policy and external authorities, but they were not complying with the direction of the court because that **had not been effectively communicated** as a directive that trumped all.

See also id. at 71-73 (discussion misdirection and destruction across various agencies including BLM and MMS). Clearly defendants disregard the admissions of destruction contained in the Inspector General's report; it stands as a veritable compendium of malfeasance and document destruction and it is highly relevant for this Court's consideration of the issues covered in plaintiffs' motions.

[10]It is important to note that the foregoing is one example of a discrete incident, among many incidents, in the systemic destruction of electronic trust records. It is noted here because of Norton's obviously ridiculous argument that no e-mail has been destroyed. A more complete statement of relevant facts is found in plaintiffs' Factual Appendix and related filings.

trustee-delegates and their counsel were deliberately destroying irreplaceable electronic trust records. Over plaintiffs' objections, the trustee-delegates obtained preliminary approval from this Court and the former master to implement the Zantaz proposal **on the explicit condition that the government subsequently comply with a clear and unambiguous "certification" and "confirmation" process** expressly prescribed by the master and adopted by this Court.

In violation of that order, the contemnors provided **no** such certification and confirmation and concealed from this Court and plaintiffs Norton's contemptuous decision to relieve her employees of their unconditional obligation to preserve hard copy versions of e-mail and relieve system administrators of their unconditional obligation to make **and** preserve all relevant e-mail backup tapes. As such, they and other contemnors knowingly and willfully took actions that ensured the continuing systemic destruction of whatever electronic trust records remained through their contemptuous implementation of the Zantaz proposal. To be sure, if the Zantaz proposal, in reality, had preserved and indexed every single e-mail and electronic record such that it is now retrievable for production in this litigation, plaintiffs would have little quarrel substantively with contemnors' implementation of the proposal (other than Norton's willful violation of the terms of the order requiring "certification" and "confirmation"). But, in fact, implementation of the Zantaz proposal has resulted in further destruction of irreplaceable individual Indian trust records and it is far frin the so-called "fix" promised by Norton and her counsel. Once again they have lied to this Court and plaintiffs. And, they covered it up.

As explained above, thee trustee-delegates contemptuous implementation of Zantaz necessarily (1) relieved every employee of his or her duty to make and preserve hard copies of each electronic record covered by Zantaz, and (2) relieved system administrators of their duty to make and preserve backup tapes that would have permanently stored an electronic version of each such trust record. Accordingly, each time the Zantaz proposal fails to capture and preserve an e-mail, the trust data and other information contained in such e-mail are lost forever. This, contemnors cannot dispute in good faith. Therefore, because contemnors cannot honestly dispute

the fact that irreplaceable trust records have been, and continue to be, destroyed at all times relevant to this litigation, they fall back on their utterly specious claims that plaintiffs' motions lack sufficient specificity. Nothing can be further from the truth.

III. HORD TIPTON'S MARCH 25, 2005 TESTIMONY CORROBORATES PLAINTIFFS' MOTIONS

On March 25, 2005, plaintiffs deposed Department of the Interior, Chief Information Officer Hord Tipton concerning, among other things, contemnors' destruction of electronic trust records, including e-mail.[11] It is informative to whether a show cause order should issue that Norton, Cason, their employees and their Department of Justice and Solicitors Office attorneys easily could have confirmed the merits of plaintiffs' motions at any time prior to March 25, 2005 – by simply asking Tipton. Instead, defense counsel filed briefs with this Court **as if they never read any part of the record of these proceedings** – acting blind and deaf to ceaseless spoliation of trust records and its coverup at all times relevant to this litigation. In reality, the facts point to malice – and expose their feigned sighs of ignorance.

Tellingly, Tipton regularly provides "incident reports" to the Department of Justice (and the Solicitor's Office) regarding the destruction of relevant electronic data and other information. Damningly, these "incident reports" have never been filed with, or disclosed to, this Court.

Q Have you been provided a list of lost tapes?
A Not in summary, not collectively. Piecemeal.
Q Have you been provided a list of destroyed tapes?
A What do you mean "destroyed"?
Q Overwritten, destroyed based on weather conditions, such as poor storage and water, mold, other types of environmental conditions, Hanta virus

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A Reacting to that broad definition of "destroyed," I don't have an itemized list. As I said, **we do not have a comprehensive report of that, but we**

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[11]Plaintiffs note that a complete deposition of Hord Tipton was transmitted at 1:42PM on this date. This transcript is attached hereto as Plaintiffs' Exhibit 4. In addition, Tipton's deposition has been continued with the consent of the Department of Justice for **at least** one additional seven hour and fifty-one minute day. *See* Plaintiffs' Exhibit 4 at 352:14-18. Plaintiffs expect to provide further supplemental information in this regard once Tipton's deposition is concluded – provided, of course, he does not choose to exercise his Fifth Amendment rights.

do have it in individual incident reports.

See Plaintiffs' Exhibit 4 Tr. at 132:18-133:17 (emphasis added). It is inexplicable how contemnors can represent to this Court with certainty that no relevant e-mail has ever been destroyed at the same time the chief information officer – the official charged by statute with ensuring the integrity of the electronic systems and data – confesses that he has no list, inventory, or compendium of the various and continuing incidents of destruction. *Id*.[12]

Indeed, Tipton states that while it is possible for him to make some assumptions, it is impossible for him to provide under oath a reasonable of estimate of the number of tapes that have been lost at Interior:

> Q How many have been lost to your knowledge?
> A I'm not sure I could even get an estimate on that sin[c]e **the availability of tapes from bureau to bureau varied over that time period, <u>1999 forward</u>**. So if we didn't have the tapes, I presume that that does not mean that they were lost.

Id. at 130:2-7 (emphasis added). However, he says under oath that despite his failure to prepare a comprehensive report on Interior-wide destruction, discrete incident reports have been provided to government lawyers for "all . . . relevant bureaus." *Id.* at Tr.136:7-11. And, Tipton's testimony makes clear that such incident reports were vetted by Solicitor's Office attorneys and then transmitted to the Department of Justice. *Id.* at Tr.139:13-140:7.

> Q My question, I think you also testified that you are provided reports from the bureaus when incidents of that nature occur; is that correct?
> A Yes.
> Q And you've also testified that you provided that information to your lawyers, correct?
> A Yes.
> Q And you testified you didn't know whether or not all of the incidents that have been reported to you have been reported to the court, correct?
> A I'm not in a position to know.
> Q Now, when you said to your counsel, do you provide those directly to Justice or do you provide them directly to the Solicitor's Office?
> A **I believe my project manager provides them directly to Justice after consulting or discussing with Interior attorneys**.

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[12]Parenthetically, **no** attorney from the Office of the Solicitor or Department of Justice has ever asked Tipton to prepare a report or conduct an audit of the Department-wide practice of overwriting of backup tapes. *Id.* at 112:5-14.

Id. (emphasis added). Plaintiffs will reiterate that **no** "incident reports" have ever been filed with this Court. **None.** To be clear, defense counsel has custody the of still-suppressed "incident reports" that Tipton has attested to under oath; reports that detail the destruction of electronic evidence in "all . . . relevant bureaus" at the same time the contemnors argue that "plaintiffs have not provided a shred of evidence" that such electronic trust records have been destroyed. Their mendacity knows no bounds.

Once an e-mail backup tape is destroyed, the data embedded therein is destroyed and cannot be retrieved. And, Tipton "concede[s]" that it is "nearly impossible" to recover such data. *Id.* at Tr.150:10-150:16. In any event, the trustee-delegates have never even attempted to recover trust data that has been so contemptuously overwritten. *Id.* at Tr.147:12-148:20. It is impossible to quantify the number of e-mails that are embedded in any given e-mail backup tape. Accordingly, the destruction of **each backup tape** constitutes an individual, discrete event of destruction that is, in and of itself, massive and unquantifiable.[13] Tipton concedes that it would be "entirely speculative" to attempt to quantify the damage done by such spoliation.[14] Even today, Tipton concedes that the Interior Department may be destroying e-mail and that no one can guarantee that it is preserved. *Id.* at Tr.173:17-174:3.

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[13] Q As a result, is it, as a matter of fact, impossible to quantify the number of E-mails that have been destroyed if the overwritten back-up tapes haven't been restored? Isn't that impossible to quantify?
A It's impossible to be exact.

Id. at Tr.153:1-6.

[14] Q And do you have any idea is it possible to even estimate based on your knowledge of how much E-mail was lost or destroyed from, let's say, June 10th, 1996 through whenever the project commenced in 1999? Do you have any way to estimate that on a department-wide basis?
A Again, if you're looking at the E-mail as the sole record of the transmission and discounted any printed data from that, assuming that it's lost simply because it's overwritten, one could make a rough approximation of how many messages went through the system at that time, but again, it is speculative, and it would be rough.
Q It would be **entirely speculative**, wouldn't it?
A **Without actually being able to restore it, yes**.

Id. at 155:15-156:9 (emphasis added). *See also id.* at Tr.154:6-8.

On January 31, 2005, Tipton reported to this Court the failure of Zantaz to capture BIA e-mails for almost four months. Therein he stated: "BIA **believes** that no data was lost by the event."[15] The reality is that Tipton, at the time he made this representation had no idea whether or not – or how much – data was lost; he has no idea now. Moreover, he has no knowledge of the impact such spoliation has had on plaintiffs. A candid report from Tipton would state: "I do not know how much data has been lost and do not know if it is possible to assess the nature and scope of harm that such destruction has caused plaintiffs." But, candor is utterly alien to Tipton, Norton, Cason, *et al*. Indeed, notwithstanding the strong admonitions of this Court and the due diligence obligations of defense counsel as set forth in Rule 11, defense counsel asked Tipton to execute representations to this Court knowing that Tipton did not know whether the information that he certified and attested to is accurate and complete. To be clear: Tipton has no idea whether or not e-mail was lost during the four month period that BIA mail servers were not transmitting electronic records to Zantaz. Therefore, while he may say truthfully that he "believes" no e-mail had been lost, it is materially misleading to withhold from this Court the dispositive fact that he knew nothing about that which he attested to under instructions from defense counsel. **Nothing** at all.

Notwithstanding the trustee-delegates's record of mendacity in these proceedings, Tipton insists that these fiduciaries who are party litigants have no obligation to verify the accuracy and completeness of any representation they make to this Court; that this Court should assume as true, and accept on blind faith and as fact, that which he – an apparent oracle of information technology – says so long as he proclaims that he "**believes**" something to be true, whether or not he has conducted due diligence. And, he has done none.

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[15] *See Motion to Supplement Plaintiffs' Motion to Amend Plaintiffs' Motion for Order to Show Cause Why Interior Defendants and Their Employees and Counsel Should Not Be Held in Contempt for Destroying E-mail*, filed February 22, 2005 at 8 (quoting Tipton's report to the Court) (emphasis added).

IV. THE ZANTAZ PROPOSAL CONTINUES TO RESULT IN THE DESTRUCTION OF ELECTRONIC TRUST RECORDS AS EVIDENCED BY THE FILING OF THEIR MARCH 18, 2005 NOTICE TO THIS COURT

As further demonstrated in communications transmitted by Norton and her counsel no more than ten days ago,[16] implementation of the Zantaz proposal continues to permit the destruction of irreplaceable electronic trust records. Now, because of the reported failure of a Solicitor's Office server, additional e-mail was not captured and is lost. Yet, in disregard of all reason and in conflict with reality, Norton and her counsel represent to this Court that "[d]efendants are aware of no Zantaz outages during the period that e-mails were not transmitted through the buffer server" that would have resulted in the destruction of e-mail. *Id.* at 2.

Given defense counsel's habitual lying to this Court and plaintiffs about the true status of anything, including information technology security and given their proven failure to preserve irreplaceable trust records, it should come as no surprise to this Court that this latest protestation of innocence is without any support whatsoever. In addition, a second incident has been disclosed that admits that NBC e-mails were not transmitted to Zantaz. *Id.* at 2 fn. 1. These e-mails are also lost – forever.

In short, Zantaz proposal is merely one more in an inexhaustible series of lame excuses for the continuing, systemic destruction of irreplaceable trust records.[17] The fact that it has occurred through a process that violates this Court's clear orders underscores why this Court should grant plaintiffs' motion. No one in good faith can state otherwise.[18]

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[16] *Defendants' Notice Regarding January 31, 2005 Zantaz Report and Related Zantaz Matters*, filed March 18, 2005.

[17] Norton and her counsel continue to insist that "[p]laintiffs have not supplied any evidence indicating that the statements by Mr. Maloney and Mr. Tipton are not correct." *See* Opposition at 4. To the contrary, plaintiffs have discussed Maloney and Tipton's role in filing false certifications in their February 22, 2005 motion to supplement. *Id.* at 3-5. It is difficult to make the English language any plainer.

[18] Norton and her counsel continue to claim that they disclosed the destruction of irreplaceable trust records to this Court. *See* Opposition at 3 fn. 1. In their defense they cite to a motion to defer filed on December 16, 2004. *Id*. To be clear, plaintiffs have been putting this Court and the

V. THE ARGUMENTS MADE BY THE TRUSTEE-DELEGATES AND THEIR COUNSEL ARE IN BAD FAITH AND BELIE THE GOVERNMENT'S REPRESENTATIONS OF GOVERNING LAW IN PHILIP MORRIS

The government has argued to the district court and to the Court of Appeals in *Philip Morris USA*[19] that the defendants should be sanctioned and fined for "system-wide deletions of electronic mail that occurred at Philip Morris on a monthly basis . . . in combination with a company policy that required back-up tapes to be recycled and overwritten . . . ." *See* Plaintiffs' Exhibit 5 (United States Memorandum in Support of the United States' Motion for Evidentiary and Monetary Sanctions Against Philip Morris USA and Altria Group Due to Spoliation of Evidence)[20] at 1. No doubt this is familiar to Assistant Attorney General Peter Keisler and his civil division employees who are defending the trustee-delegates in *Cobell* as he and several of his employees are also counsel to the United States on this memorandum. The PM Destruction Memorandum is relevant here because it exposes the nature and scope of their specious claims and untenable arguments in *Cobell* – conflicted, self-serving claims that the trustee-delegates and their counsel know are contrary to governing law and are in direct conflict with the formal position adopted by the government regarding the systemic spoliation of evidence and the inherent authority of this Court to impose the most draconian sanctions for such palpable misconduct.

The facts stated in the PM Destruction Memorandum demonstrate that Philip Morris, in violation of court order, had engaged in the "system-wide" destruction of e-mail. Such

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trustee-delegates on notice of Interior's systemic destruction of electronic trust records for over six years. That trustee-delegates filed a motion to defer in December of last year claiming that they had disclosed one incident of destruction hardly constitutes compelling good faith when considering plaintiffs' identification of – and, trustee-delegates' denial of – the destruction of e-mail for over six years prior. Indeed, in light of such rote denials that any e-mail has ever been destroyed, it is curious that they also wish to claim credit for bringing the latest incident of destruction to this Court's attention. Nonetheless, plaintiffs acquiesce and concur that on December 16, 2004 the trustee-delegates expressly confessed that they destroyed a massive and unquantifiable amount of trust records in violation of Court orders.

[19] *United States v. Philip Morris USA Inc., et. al.* (99-CV-02496).

[20] Hereafter referred to as "PM Destruction Memorandum."

malfeasance was compounded by a flawed "print and retain" policy for the retention of e-mail that exacerbated the destruction. *Id.* at 4-8, 12-15. Sound familiar? Ironically, the United States expressed outrage at such misconduct and indignantly noted that "high level management . . . were aware that the company's policies were resulting in the failure to preserve documents required for litigation. Those policies included monthly system-wide deletions of email, which continued after entry of the Preservation Order. . . ." *Id.* at 2. In addition, as here, Philip Morris failed to take "easy and inexpensive steps that would have prevented the irretrievable loss of deleted email." *Id.* at 15.[21] In short, Philip Morris destroyed e-mail, but not on the massive, systemic scale that the trustee-delegates and their counsel have done at all times relevant to these proceedings.

To be sure, while senior management at Philip Morris was on notice of such destruction, the United States never provided evidence that Philip Morris intended to destroy such electronic records. Here, however, senior Solicitor's Office attorneys knowingly and willfully authorized the deletion of all Solicitor's Office e-mail in violation of this Court's orders and representations and promises to this Court and plaintiffs' counsel that all such records would be preserved. Moreover, such spoliation was covered-up and the trustee-delegates and their counsel repeatedly lied to this Court in furtherance of their coverup. Such bad faith and malfeasance has now been exacerbated by Norton, Griles, Cason, *et al.* and their defense counsel, all whom have acted to conceal continuing widespread destruction, now institutionalizing their on-going malfeasance with their contemptuous implementation of the Zantaz proposal.

Philip Morris is no innocent party-litigant and, in fact, plaintiffs are in full agreement with the government's position that the district court presiding over the Phillip Morris case should impose the most draconian contempt sanctions for the spoliation of e-mail there. But, here it is far worse. The defendants are fiduciaries and they and their lawyers have together to systemically destroy irreplaceable trust records, lie to this Court and plaintiffs about their misconduct, and willfully inflict irreparable harm on plaintiffs as a consequence of such palpable spoliation.

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[21]And, *see, e.g, id.* at 15-18.

For Philip Morris' destruction, the United States sought – and was awarded – monetary and evidentiary sanctions. In seeking such sanctions, the United States asserted multiple grounds for the imposition of sanctions including F.R.C.P. 16(f) (failing to obey a scheduling or pretrial order) and 37(b)(2) which:

> authorizes the Court to enter sanctions such as '[a]n order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence,' and order 'striking out pleadings or parts thereof . . . . or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient part,' or 'an order treating as contempt or court the failure to obey any order.'

See Plaintiffs' Exhibit 5 (PM Destruction Memorandum) at 28 (*quoting* F.R.C.P. 37(b)(2)).[22] Damingly for the trustee-delegates, the United States in Phillip Morris is in full agreement with plaintiffs' position in *Cobell*: that in the absence of any statutory remedy, this Court has inherent authority to fashion an equitable remedy that restores the integrity of the proceedings and protects plaintiffs against further abuses of the judicial process by rogue defendants and their unethical counsel. *See generally* Plaintiffs' Exhibit 5 at 30-32 (*citing Shepherd v. Amer. Broadcasting Co.*, 62 F.3d 1469 (D.C. Cir. 1995)). Finally, in Phillip Morris, the United States states that the district court must be able to invoke equitable and other common law sanctions for spoliation (*id.* at 32-34) and urged the court to consider two key factors that support the imposition of the most severe sanctions: "Philip Morris's status as an experienced and continual party to litigation and its prior discovery behavior in this actions" (*id.* at 38).

To be sure, Philip Morris is no saint, but the duration, facts and circumstances present in here would even make those cynical tobacco company executives and their weary counsel blush.

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[22]*See also id.* at 28 *et. seq* (*citing Young v. Office of the United States Senate Sergeant at Arms*, 217 F.R.D. 61, 65 (D.D.C. 2003) and its forebears).

> Rule 37(b)(2) permits a court to issue such orders 'as are just' to sanction a party who fails to obey an order to provide or permit discovery . . . . [including] taking certain facts as established, prohibiting the introduction of certain evidence, striking pleadings or parts thereof, staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof and/or rending a judgment by default against the disobedient party.

Id. at 28-29 (*citing* Young, 217 F.R.D. at 65).

There the United States identified eleven Philip Morris executives who failed to preserve their e-mail. The district court accordingly assessed a monetary sanction of $250,000.00 for each executive for a total fine of $2,750,000. *United States v. Philip Morris USA Inc., et. al.* 327 F.Supp.2d 21, 26. The Court also precluded the testimony of all individuals who "failed to comply with Philip Morris' own internal document retention program." *Id.* at 25.

Here, throughout this litigation – before and after the entry of the consented-to document retention order – the United States through its trustee-delegates and government counsel has engaged, and continues to engage, surreptitiously and in calculated bad faith, in the systemic destruction of a massive and unquantifiable amount of electronic trust records. It is self evident and conceded by DOI – Chief Information Officer Hord Tipton that the harm to plaintiffs is irreparable and can never be fully remedied. The fact that United States has been embroiled in Indian trust litigation since buffalo had roamed free in the West and that the trustee-delegates have been held in contempt repeatedly in this litigation is powerful support for the imposition of the most severe sanctions, including the imposition of compensable monetary sanctions, coercive confinement, removal, and meaningful evidentiary and issue preclusion sanctions that are warranted and supported in proposed findings and conclusions at the close of the contempt trial(s).

VI. CONCLUSION

Plaintiffs respectfully request that this Court to grant plaintiffs' show cause motions, enter the proposed show cause orders, and set a date(s) certain for trial.

Respectfully submitted,

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March 28, 2005

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing PLAINTIFFS' REPLY IN SUPPORT OF MOTION TO SUPPLEMENT PLAINTIFFS' MOTION TO AMEND PLAINTIFFS' MOTION FOR ORDER TO SHOW CAUSE WHY INTERIOR DEFENDANTS AND THEIR EMPLOYEES AND COUNSEL SHOULD NOT BE HELD IN CONTEMPT FOR DESTROYING E-MAIL was served on the following via facsimile, pursuant to agreement, on this day, March 28, 2005.

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Blackfeet Tribe
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Browning, MT 59417
406.338.7530 (fax)

/s/ Geoffrey Rempel

Geoffrey M. Rempel