

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

ELOUISE PEPION COBELL, et al., )

Plaintiffs, )

v. )

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

Defendants. )  
\_\_\_\_\_ )

Civil Action No. 96CV01285  
Special Master Alan L. Balaran

**CORRECTED REPORT OF THE SPECIAL MASTER REGARDING  
THE DELETION OF INDIVIDUAL INDIAN TRUST INFORMATION BY  
FORMER ASSISTANT SECRETARY-INDIAN AFFAIRS NEAL MCCALED**

On October 16, 2002, the Department of the Interior informed the Special Master that, “e-mail messages received by the Assistant Secretary - Indian Affairs [Neal McCaleb] from approximately December 1, 2001 to approximately October 1, 2002 may have been deleted before they were printed and filed.” October 16, 2002 Letter from Assistant Solicitor Sabrina McCarthy to Department of Justice Attorney Peter Miller at 1. The Special Master, concerned that the e-mail messages referenced in the October 16 letter contained individual Indian trust data, launched an investigation into the circumstances surrounding their deletion.

What began as an inquiry into a possible error in judgment resulted in the discovery that the most senior official of the Bureau of Indian Affairs (“BIA”) violated court orders and federal law by destroying individual Indian trust records with impunity. The Special Master’s investigation also revealed that the Department of the Interior betrayed its most fundamental trust responsibilities by allowing its Assistant Secretary of Indian Affairs to assume command without training and by embracing

an enfeebled data-transmission backup policy that virtually ensured trust communications would neither be captured nor preserved.

## **PROCEDURAL HISTORY**

Upon receipt of the October 16, 2002 letter, the Special Master directed Interior to explain:

(1) who destroyed Mr. McCaleb's incoming e-mail messages for 10 months; (2) why Mr. McCaleb's incoming e-mails were not printed and filed during this 10-month period; (3) when the destruction of Mr. McCaleb's incoming e-mails was first detected; (4) who discovered that Mr. McCaleb's incoming e-mails had been destroyed; and (4) [sic] how the destruction of Mr. McCaleb's incoming e-mails went undetected for 10 months.

October 20, 2002 Letter from Special Master Alan Balaran to Department of Justice Attorney Peter Miller at 1-2. See Attachment 5.

Interior responded on November 8, 2002, in a letter from Assistant Solicitor Sabrina McCarthy to Department of Justice Attorney Peter Miller at 1, ("McCarthy Response") (Attachment 6), as follows:

### McCarthy Response

The McCarthy Response attributed the deletion of the former Assistant Secretary's e-mails to "his understanding that a Staff Assistant saved his Cobell-related e-mail messages." McCarthy Response at 1. According to McCarthy, the former Assistant Secretary's "practice was to leave Cobell-related e-mail messages on his computer indefinitely. . . . until the late spring or early summer of 2002, when he began receiving e-mail messages that he had exceeded the maximum memory threshold allowable and that he might not be able to send or receive e-mail if he did not archive or delete e-mail." McCarthy Response at 1. McCarthy explained that the former Assistant Secretary proceeded to

delete his electronic correspondence because, “[t]here was not a clear understanding between Mr. McCaleb and the Staff Assistant. Mr. McCaleb believed that his incoming e-mail messages were being saved by the Staff Assistant. The Staff Assistant, on the other hand, believed that she had not been asked to ensure that the messages were saved, printed and filed.” McCarthy Response at 3.

As to the events that led to the discovery of the deleted electronic correspondence, McCarthy informed the Special Master that, “[o]n October 10, 2002, in preparation for a scheduled deposition, anticipating questions regarding e-mail issues, Mr. McCaleb verified with the Staff Assistant that his e-mail messages had been saved, as required. During this conversation, Mr. McCaleb discovered that the Staff Assistant had not been electronically storing his e-mail messages on a regular basis.”

McCarthy Response at 3.

#### McCaleb Declaration

On November 10, 2002, the Special Master directed former Assistant Secretary McCaleb to file a signed declaration attesting to the truth of the statements set out in the McCarthy Response. See November 10, 2002 Letter from Special Master Alan Balaran to Department of Justice Attorney Sandra Spooner. On November 20, 2002, Interior complied and submitted to the Special Master the November 19, 2002 Declaration of Neal McCaleb (“McCaleb Declaration”). See Attachment 7.

In the McCaleb Declaration, the former Assistant Secretary swore that it was his “impression that [his] Administrative Assistant<sup>1</sup> was saving [his] e-mail messages relating to American Indian Trust Reform, including the High-Level Implementation Plan or any of its subprojects; the Cobell v. Norton

---

<sup>1</sup> McCaleb repeatedly referred to Jean Maybee as his Administrative Assistant rather than as his Staff Assistant, her correct title.

litigation; and administration of Individual Indian Money accounts.” McCaleb Declaration at ¶ 3. He affirmed that his initial practice was “to leave all Cobell-related e-mails on [his] computer indefinitely [until] [i]n the late spring or early summer of 2002, [when he] began receiving automatic messages on [his] computer stating that [he] had exceeded the maximum memory threshold allowable and that [he] might not be able to send or receive e-mail if [he] did not delete e-mail.” McCaleb Declaration at ¶ 4. Upon receipt of these messages, McCaleb, “began immediately deleting all e-mail messages that were not Cobell-related.” McCaleb Declaration at ¶ 5. “As an extra precaution,” however, the former Assistant Secretary “continued to save Cobell-related e-mails for at least a couple of weeks, with the intent of allowing enough time to pass for the e-mails to be captured by Department of Interior backup tapes.” McCaleb Declaration at ¶ 5.

According to McCaleb, “[p]rior to October 10, 2002, [he] was never informed that [his] e-mail messages were not being electronically preserved,” (McCaleb Declaration at ¶ 6), and it was only “[o]n October 10, 2002, in preparation for a scheduled deposition, anticipating questions regarding e-mail issues, [that he] spoke with [his] Administrative Assistant to confirm that [his] e-mail messages had been saved as required.” McCaleb Declaration at ¶ 7. It was during this conversation, “that [McCaleb] first discovered that [his] Administrative Assistant had not been electronically storing [his] e-mail messages on a regular basis, as [he] had previously believed.” McCaleb Declaration at ¶ 7.

#### Draft Affidavit

In addition to the McCarthy Response and the McCaleb Declaration, the events surrounding the destruction of McCaleb’s e-mails were chronicled in a 13-paragraph affidavit prepared by Deputy

Assistant Secretary Aurene Martin for the signature of the former Assistant Secretary (“Draft Affidavit”).<sup>2</sup> See Attachment 8.

The Draft Affidavit provides that, “[f]rom the beginning of [his] tenure as Assistant Secretary - Indian Affairs on July 4, 2001, until sometime in December 2001, [McCaleb] retained all e-mails that [he] received in [his] ‘Inbox’ on [his] e-mail account.” Draft Affidavit at ¶ 5. “Between the period of Thanksgiving and Christmas of 2001, it was [McCaleb’s] understanding that [Staff Assistant] Jean Maybee electronically filed all previous e-mails relating to the three categories listed in paragraph 4 in folders within his Lotus Notes account,” (Draft Affidavit at ¶ 7), and “[a]t or about the time of these events, [he] came to the believe [sic] that the Bureau of Indian Affairs e-mail system were [sic] backed up as soon as they entered the BIA e-mail system or were sent through or out of the BIA e-mail system.” Draft Affidavit at ¶ 8. The Draft Affidavit further states that McCaleb “would not have deleted e-mail if [he] had not believed that it was backed up,” (Draft Affidavit at ¶ 9), and that the former Assistant Secretary,

believed that [his] e-mail administration was in compliance with court ordered requirements in the Cobell v. Norton litigation based on [his] recollection of communications [he] had with [his] assistant Jean Maybee. It was [his] understanding that in the period after Thanksgiving through December 2001, Jean Maybee was assuring that [his] e-mail administration was in compliance with court-ordered requirements, although [he] cannot recall a specific conversation or agreement that she was doing so.

Draft Affidavit at ¶ 10.

---

<sup>2</sup> The circumstances surrounding the generation of the Draft Affidavit are discussed more fully below. See pp. 47-51, *infra*.

Regarding the circumstances that led to the deletion of e-mails, the Draft Affidavit explains that, “[i]n the spring of 2002,” McCaleb “began to receive messages when [he] opened [his] e-mail account that [his] e-mail files exceeded the allowable memory threshold. . . . and that the user may not be able to send or receive mail if they do not archive or delete e-mails.” Draft Affidavit at ¶ 11. “As a result of this message,” McCaleb “began to delete e-mails that did not fall within the three categories listed in Paragraph 4 [“Three Functional Areas”] immediately after reading them.” Draft Affidavit at ¶ 12. He also “began to delete e-mails related to [the Three Functional Areas], after some length of time had passed.” Draft Affidavit at ¶ 12. Finally, the Draft Affidavit states that McCaleb “never deleted e-mail that is located in the “Sent” box of [his] e-mail account.” Draft Affidavit at ¶ 13.

Approved as Amended Affidavit

McCaleb reviewed the Draft Affidavit, inserted three handwritten changes and, at the bottom of the first page, dated, initialed and marked: “Approved as Amended.” See Attachment 9 (“Approved as Amended Affidavit”). The three changes included one McCaleb made to Paragraph 5, changing it from, “I retained all e-mails that I received in my ‘Inbox’ on my e-mail account” (emphasis added), to, “my assistant Ms. Jean Maybee retained all e-mails that I received in my ‘Inbox’ on my e-mail account.” (emphasis added); another to Paragraph 9, changing it from, “e-mail that fell into the three categories listed in Paragraph 4 [Three Functional Areas] were being periodically filed by my Assistant Jean Maybee,” to, “e-mail that fell into the three categories listed in Paragraph 4 were being periodically filed by my Assistant Jean Maybee and/or by the BIA OIRM.”(emphasis added); and another to Paragraph 13, changing it from “I have never deleted e-mail that is located in the “Sent” box of [his] e-mail account,” to, “I saved all my ‘sent’ e-mail since 11-1-01 to 11-16-02. I began deleting

my 'sent' e-mail in Sept. & Aug. '02 in response to the system message that my e mail files were exceeding the memory threshold.” Depositions

To obtain additional information, on December 6, 10 and 13, 2002, the Special Master deposed former Assistant Secretary-Indian Affairs Neal McCaleb, BIA Staff Assistant Jean Maybee and BIA Deputy Assistant Secretary Aurene Martin, respectively. Their depositions yielded the following information:

Neal McCaleb

Neal McCaleb assumed the position of Assistant Secretary – Indian Affairs on July 4, 2001, (Deposition of Neal McCaleb (December 6, 2002) at 7 (“NM”)).<sup>3</sup> Prior to his appointment, McCaleb served as Oklahoma’s Secretary of Transportation; supervised the construction and maintenance of Oklahoma’s transportation systems and state-assisted general airports program; and served eight years in the Oklahoma House of Representatives, where he was elected Minority Floor Leader. (NM at 41-42).

McCaleb admitted: (1) that none of his previous jobs “involve[d] trust or fiduciary responsibilities,” (NM 32); (2) that he never attended “any courses in trust or fiduciary law,” (NM 32-33); (3) that he never had “anybody sit down with [him] and go over the 1994 Trust Reform Act,” (NM 33); (4) that he never attended “any formal orientation . . . that went into the high level plan or went into the 1994 Trust Reform Act,” (NM 34); and (5) that he never was informed by the Office of

---

<sup>3</sup> On November 21, 2002, McCaleb announced his intention to retire – citing a “contentious and litigious environment.”  
<http://www.indianz.com/News/show.asp?ID=2002/11/22/mccaleb>.

the Solicitor of the Department of Justice as to the substance of his trust responsibilities, (NM 35) – much less that he “had trust responsibilities as the assistant secretary.” (NM 36).

McCaleb further acknowledged that, before assuming office, he had no prior experience with Lotus Notes (NM 43) – “the e-mail system used by the Bureau of Indian Affairs (BIA) and the Office of the Assistant Secretary . . . supported on the BIA e-mail system.” Draft Affidavit at ¶ 6.<sup>4</sup> He was never trained to use the program, never sought training, was never offered any training, (NM 43), was unable to identify the BIA’s e-mail administrator, (NM 44), and professed to have had no contact with such a person. (NM 44).<sup>5</sup>

Jean Maybee

BIA Staff Assistant Jean Maybee is employed both by the Deputy Commissioner of Indian Affairs and the Assistant Secretary of Indian Affairs for the Department of the Interior, (see Deposition of Jean Maybee at 7 (December 10, 2002) (“JM”)), and serves as “a liaison . . . between the two offices.” (JM 7). She has worked in that capacity for four and one-half years, (JM 119), prior to which she was employed in the budget office of the BIA Phoenix, Arizona regional director’s office. (JM 119). Her present duties include oversight of the “administrative budget” for the Deputy Commissioner’s office, (JM 9); supervision of personnel “related to the running of the Office of the Deputy Commissioner and running of the Office of the Assistant Secretary for Indian Affairs,” (JM 10);

---

<sup>4</sup> Lotus Notes is “a database-driven groupware application that manages information for many users on the network to communicate, collect, and share database documents following a client/server model.” <http://www.uic.edu/depts/acc/hardware/notes/domino.html> (December 18, 2002).

<sup>5</sup> During all relevant time periods, BIA’s Lotus Notes Administrator was Eric Eskam and the Acting Team Leader was Kym Burns. See E-mail from Kym Burns to Wendell Scubert et al. (October 4, 2002) (Attachment 10).

and “work[ing] with the regional directors and their staff on any issues that arise in the field.” (JM 7). Maybee also maintains “the calendars, the travel schedules, and all of the vouchers for both the Deputy Commissioner’s office, and the Assistant Secretary’s office,” (JM 7-8), and supervises the “support staff” by “assigning them duties.” (JM 11). During her ten and one-half years working for the BIA, Maybee has been the recipient of approximately 15 “Performance” awards, (JM 120), and approximately six to eight “Star” awards. (JM 122).

Lotus Notes was in use when Staff Assistant Jean Maybee came to work for the Office of the Deputy Commissioner. (JM 35). Like McCaleb, Maybee also was not trained to use the program nor does she believe that a mandatory training program exists, (JM 35) – having seen no “directives or any memoranda, correspondence, or any writing directing [her] or anybody in [her] office to attend a seminar or training on the use of Lotus Notes,” (JM 35-36), such as those available for WordPerfect, Lotus123, and PowerPoint. (JM 36).

#### Aurene Martin

Aurene Martin assumed the position of Deputy Assistant Secretary-Indian Affairs on July 1, 2002, (Deposition of Aurene Martin at 10 (December 13, 2002) (“AM”)). She is one of two Deputy Assistant Secretaries for Indian Affairs who report to McCaleb. While Martin “work[s] directly with the tribal leaders, advising [] on legal issues relative to a variety of things,” (NM 8), Deputy Assistant Secretary James McDivitt oversees the administrative aspects of the office, including budget and information. (NM 8-9). Prior to encumbering her present position, Martin served as “counselor to the Assistant Secretary, Indian Affairs” from October 21, 2001 until May 23, 2002. (AM 11). Despite her title, Martin testified she had never represented McCaleb in any legal proceedings, (AM 14); never

provided him with legal advice “in a way that could be construed as attorney-client,” (AM 14); and never engaged in conversations that were governed by the attorney-client, work-product or deliberative-process privileges. (AM 14).

## **DISCUSSION**

### **I. McCaleb Was Legally Bound to Preserve Individual Indian Trust Records .**

As Assistant Secretary, McCaleb was obliged to scrupulously preserve and retain individual Indian trust-related information in accordance with court orders, federal statute and agency regulation.<sup>6</sup> This duty is an outgrowth of one of the most fundamental tenets of trust law that requires a trustee to preserve records in a manner that provides trust beneficiaries access “to such information as is reasonably necessary to enable [them] to enforce [their] rights under the trusts or to prevent or redress a breach of trust.” Restatement (Second) Trusts § 173 (Comment C). See Security & Exchange Comm. v. Sargent, 229 F.3d 68, 76 (1<sup>st</sup> Cir. 2000) (recognizing a “fiduciary duty to safeguard information relating to” trust); Forys v. United Food and Commercial Workers’ Intern. Union, 829 F.2d 603, 607 (7<sup>th</sup> Cir. 1987) (“the principal statutory duties imposed on the trustees relate to the proper management, administration, and investment of fund assets; the maintenance of proper records; the disclosure of specified information; and the avoidance of conflicts of interest”) (emphasis added); Rippey v. Denver U.S. Nat. Bank, 273 F.Supp. 718, 735 (D.C.Colo. 1967) (“It is generally agreed

---

<sup>6</sup> The Office or the Assistant Secretary is “responsibil[e] for fulfilling the Department’s trust responsibilities and promoting self-determination on behalf of Tribal governments, American Indians and Alaska Natives” and “for providing services to approximately 1.4 million American Indians and Alaska Natives who are members of the 558 federally recognized tribes.” <http://www.doi.gov/bia/news/mccalebconfirm.htm>. (Emphasis added.)

that a trustee owes a duty to his beneficiaries to exercise such care and skill as a man of ordinary prudence would exercise in safeguarding and preserving his own property.”).

On August 12, 1999, this Court ordered Interior to distribute memoranda: (1) reminding employees charged with custody of trust records “of their obligations regarding the retention of documents and data relating to the Department’s duties to manage Indian trust funds and IIM accounts” and (2) cautioning that “records be protected against loss, unauthorized destruction or modification, and illegal removal.” Cobell v. Babbitt, Order Regarding Interior Department IIM Records Retention (August 12, 1999). Apropos of trust data residing on electronic media, the Court remarked, on April 4, 2000, that it was “alarmed and disturbed by the revelation that BIA had no security plan for the preservation of [trust] data,” Hon. Royce C. Lamberth, April 4, 2000 Hearing at 11-12, and, on July 27, 2001, the Special Master reported that Interior had “ignored its duty to retain and preserve backup tapes of e-mail messages” in derogation of its trust responsibilities. Cobell v. Norton, Opinion at 17 (July 27, 2001).<sup>7</sup>

---

<sup>7</sup> The Special Master specifically found that,

notwithstanding existing requests for discovery and repeated court orders denying Interior’s attempts to block backup tape retention, search and production, the Office of the Solicitor engaged in a pattern of overwriting (and thus destroying the data embedded in) e-mail backup tapes generated at: (1) the main headquarters in Washington, D.C. as well as in its 18 field and regional offices between June 1998 and November 1998; (2) 17 field and regional offices between November 1998 and May 1999; and (3) 11 field and regional offices between May 1999 and November 20, 2000.

Cobell v. Norton, Opinion at 16 (July 27, 2001).

Beyond these judicial exclamations, the duty to preserve and maintain trust records is independently rooted in legislation such as the Federal Records Act (44 U.S.C. § 3310 et seq.), which establishes the responsibilities of federal agencies with respect to the creation, management, and disposition of records – defined as “documentary materials ‘made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business,’” (44 U.S.C. § 3301) – including electronic communications. See American Historical Ass’n v. Peterson, 876 F.Supp. 1300, 1303 (D.D.C. 1995) (“electronic records created by the ‘agency’ components of the Executive Office of the President are subject to the Federal Records Act”) (citing Armstrong v. Executive Office of the President, 810 F.Supp. 335 (D.D.C. 1993), aff’d in part, rev’d in part, 1 F.3d 1274 (D.C.Cir. 1993)).

Interior has acknowledged these obligations by promulgating numerous regulations and directives governing the retention of electronic correspondence. Section 384 of the Departmental Manual, subsection 3.4, provides, in pertinent part, that “[a]ll official records, regardless of their form, belong to the Department rather than the officer who has custody of them and are to remain in the custody of the Department until there is official authorization for disposal.” (Emphasis added.)

During McCaleb’s tenure, the agency distributed the following directives:

- Memorandum generated on August 3, 2001 by then-Chief Information Officer Daryl W. White (with copies to numerous Interior officials, including the Assistant Secretary - Indian Affairs) reminding “selected Chief Information Officers, heads of Offices, their records management officers, and their e-mail system administrators of the requirement to preserve existing and future e-mail system backup tapes or other storage media related to Indian trust management and Individual Indian Money (IIM) accounts.” (SMREQ0024958 - SMREQ0024961);
- Memorandum generated on November 28, 2001 by then-Chief Information Officer Daryl White to senior Interior officials (including the Assistant Secretary - Indian

Affairs) with “Instructions to E-Mail System Administrators for Notifying E-Mail Users of the Capture of E-Mail Messages on Backup Media,” permitting “e-mail users to delete messages related to the Three Functional Areas, once the messages have been printed and filed.” (SMREQ0024955 - SMREQ0024957);

- April 4, 2002 Memorandum from Solicitor William G. Myers, III and Assistant Secretary - Policy, Management and Budget directed to, among others, the Assistant Secretary - Indian Affairs, forwarding “reminder instructions to . . . employees about retention of e-mail messages related to the Cobell v. Norton case.” One such instruction was to “print to paper and file all e-mail messages that you send or receive, if they relate to the Three Functional Areas.” McCaleb Exhibit 10. See Attachment 2;
- Notifications sent to all Interior employees beginning December 28, 2001 with the caption “E-Mail Document Retention” and containing the following message:

You **must** print and file e-mail messages that relate to the Three Functional Areas of 1) American Indian trust reform, including the High-Level Implementation Plan or any of its subprojects; 2) the Cobell v. Norton litigation; or 3) administration of Individual Indian Money (IIM) accounts. **The date of our last successful backup, for all Regions, which is designated for indefinite retention, is Friday, December 28, 2001.** You may delete e-mail messages related to the Three Functional Areas that you sent or received on dates up to and including December 28, 2001, after you have printed and filed the messages, with all attachments. Martin Exhibit 10. See Attachment 3.

See Attachments 1 - 3.<sup>8</sup>

---

<sup>8</sup> In response to the Special Master’s October 20, 2002 request for “copies of Interior’s policies concerning the retention of e-mails, the destruction of e-mails, the printing of e-mails, the filing of e-mails, the methods by which incidents of e-mail destruction are reported and any certifications signed by Interior employees that they are in receipt of these policies,” October 20, 2002 Letter from Special Master Alan Balaran to Department of Justice Attorney Peter Miller at 2, Interior also produced the following directives that were issued prior to McCaleb’s tenure:

- Notice from Deputy Solicitor (June 17, 1996) (“This is a reminder that all documents, including e-mails, related to the management of trust funds and IIM accounts should continue to be retained. In addition, if any documents are ever subject to disposal (such as the automatic periodic deletion of e-mails), you should be sure to retain hard copies for potential use in the litigation.”) (SMREQ0024997);

- 
- IRM Bulletin No. 1996-006 (July 25, 1996) (“the Federal Records Act applies to E-Mail records just as it does to records that are created using other media. . . . **all E-Mail messages or attachments that meet the definition of a Federal record must be added to the organization’s files by printing them out (including the essential data) and filing them with all related paper records.**”) (emphasis in original) (SMREQ0024995 - SMREQ0024996);
  - IRM Bulletin No. 1997-002 (May 12, 1997) (“requir[ing] employees to print their e-mail records to paper and file appropriately”) (SMREQ0024991 - SMREQ0024994);
  - Memo from Department Chief Information Officer (May 25, 1999) (stating that, “it is essential that these electronic records are preserved in a state that they can be searched electronically for information”) (SMREQ0024990);
  - Memo from Chief of Staff, Department of the Interior (June 2, 1999) (reaffirming the principles articulated in 384 DM 3.4) (SMREQ0024981 - SMREQ0024989);
  - Memo from Chief of Staff, Department of the Interior (August 27, 1999) (same) (SMREQ0024967 - SMREQ0024980);
  - Memo from Department of the Interior Deputy Solicitor (September 15, 1999) (advising “all personnel [to] print and properly file a paper copy of all electronic mail messages (including all transmission data in the messages) and attachments, whether sent or received, which discuss: 1) the Cobell litigation, 2) the High Level Implementation Plan or any of its sub-projects, 3) IIM trust administration, or 4) trust reform.[] This includes all e-mail, regardless of whether the substance of a particular message is contained in subsequent messages.” (SMREQ0024963 - SMREQ0024964);
  - E-mail reminder from Solicitor’s Office to “all DOI Employees” REMINDER TO SAVE E-MAIL MESSAGES IN HARD COPY (May 12, 2000) (“The Solicitor’s office reminds you to retain electronic mail which relates to (1) the Cobell v. Babbitt litigation, (2) the High Level Implementation Plan and any of its sub-projects, (3) IIM trust administration, or (4) trust reform. This is a reminder that all Department personnel are required to print and properly file a paper copy of all email (including all transmission data in which the message and attachments, whether sent or received, which discuss any of the four topics described above. These procedures apply to all email, regardless of whether the substance of a particular message is contained in subsequent messages. Please note that these procedures are broader than the normal

The Special Master's investigation revealed that McCaleb failed to review these policies and directives, familiarize himself with applicable court orders and federal statutes, heed the remonstrations of former officials or observe the manner in which other BIA employees administered their e-mail accounts. In the view of the Special Master, it was these failures that resulted in the deletion of his correspondence and ultimate destruction of trust information.

## **II The Correspondence Deleted by McCaleb Contained Individual Indian Trust Information.**

McCaleb testified that, during the Spring/Summer of 2002, a message appeared on his computer that stated: "you're running out of memory capacity in your e-mails, you need to delete some of your e-mails." (NM 86).<sup>9</sup> Upon its receipt, the former Assistant Secretary did not "call anybody," (NM 86), did not "discuss it with Miss Maybee," (NM 86), or "[w]ith the e-mail administrator." (NM 86).<sup>10</sup> McCaleb assumed that this message required him "to reduce the number of e-mails that [he] had

---

rules that apply under the Federal Records Act, and include messages received for informational purposes only, arranging meetings and other non-records." (footnote omitted.) (SMREQ0024962).

See Attachment 1.

<sup>9</sup> The message that McCaleb actually received stated: "Your mail file has exceeded the size threshold. You should delete messages and compact your mail file." See Attachment 12.

Although this message fails to remind the reader to ensure that their e-mails are first printed, filed or electronically captured, one would have expected McCaleb to make all necessary inquiries before erasing his correspondence.

<sup>10</sup> Deputy Assistant Secretary Martin's reaction to a similar message informing her that her e-mail box had exceeded its memory threshold, is instructive, for comparative purposes. (AM 79). Instead of emulating McCaleb and depressing her "delete key," Martin directed Maybee to take care of the problem, (AM 79), which resulted in a staff member of Interior's Information Technology ("IT")

stored, and [he] thought that they were being electronically stored, and [he] thought that they were being saved.” (NM 86). Accordingly, McCaleb deleted e-mails from his in-box, (NM 86-87), and “from [his] trash box,” (NM 87), even though he “hadn’t printed them.” (NM 88).

The question of paramount importance before the Special Master is whether the transmissions erased by the former Assistant Secretary contained individual Indian trust information. And although neither the October 16, 2002 letter nor the McCaleb Declaration concede this point,<sup>11</sup> it is the view of the Special Master that such was the case. This is evidenced, in the first instance, by McCaleb’s admission that he “delete[d] the OIRM morning reports,” (NM 55), “other incoming e-mail,” (NM 55), and “probably” “incoming Cobell e-mail,” (NM 55),<sup>12</sup> and did so “intentionally” and “knowingly.” (NM 96) (emphasis added).

Putting aside the fact that a precise definition of “trust records” remains elusive (notwithstanding the agency’s diligent and laudable efforts), it is the view of the Special Master that few documents fall

---

division being dispatched to her office and more memory being added to her computer. (AM 79, 80). According to Martin, it is “pretty generally known” (AM 81) that BIA has an IT department and a help desk stationed at Interior that will “actually come up to your office and assist [] with various problems.” (AM 80).

<sup>11</sup> McCaleb testified that he reviewed the October 16, 2002 letter informing the Special Master of the destruction of his e-mails “fairly soon after it was prepared” (NM 47) and that he believed it to be accurate. (NM 56-57). Martin recalled being “asked to review” it “prior to it being sent out,” (AM 31), and also attested to its accuracy. (AM 31).

<sup>12</sup> Whereas the McCaleb Declaration asserts only that, “[a]s a result of these messages, [McCaleb] began immediately deleting all e-mail messages that were not Cobell-related,” (McCaleb Declaration, at ¶ 5) (emphasis added), the McCarthy Response concedes that McCaleb “also began deleting *Cobell*-related e-mail messages, but only after saving them for at least a couple of weeks.” McCarthy Response at 1.

more squarely within this category than the OIRM Morning Reports.<sup>13</sup> See Attachment 11. The reports were generated so that McCaleb “could see when [the agency] instituted a method of paying out some of the mineral leases based upon estimates from previous month’s payout, so [he] could see how much money was getting into the hands of the IIM account holders.” (NM 55). They convey information “on the money disbursed to IIM account holders pursuant to the shutdown in December, whereby IIM account holders were unable to receive their monthly distributions.” (NM 55).

In addition, the Special Master finds that McCaleb’s alarming lack of facility with the most basic trust principles and programs renders it likely he deleted other forms of individual Indian trust data without knowing he was doing so. Admitting his understanding of his fiduciary obligations was limited to “on the job training,” (NM 32-35), the former Assistant Secretary was unable to identify one of the two primary legacy systems, (NM 154-55);<sup>14</sup> erroneously believed that TAAMS was the “system of

---

<sup>13</sup> McCaleb acknowledged that the OIRM Morning Reports contained trust information.

Q. Do you believe that there were any communications that you deleted that were Indian trust records?

A. No.

Q. Even though they related to - -

A. Well, let me readdress that issue. The IIM account daily reports clearly had information about Indian Trust records. I deleted those, we recovered them.

NM 89-90.

<sup>14</sup> The legacy systems include LRIS, the Land Records Information System, and IRMS, the Integrated Records Management System. IRMS, “is a Major BIA Application [that is] a collection of six separate databases” including Lease/Range, Lease Distribution, Ownership, Individual Indian Monies, Oil and Gas and People/Per Capita. Integrated Records Management System (IRMS) System Security Plan at 7-8 (June 30, 2001) (DEF0030823-DEF0030824), while LRIS, “maintain[s] an up-to-date register of land, currently or previously owned by Indians.” Land Records Information System (LRIS) System Security Plan at 7 (June 30, 2002) (DEF0030751).

record” in Billings, Montana, (NM 156),<sup>15</sup> and, most significantly, was unable to “distinguish between an e-mail that falls within one of the three functional areas or one that does not.” (NM 107).<sup>16</sup> If the former Assistant Secretary were to receive a communication containing the word “LRIS” or “IRMS,” he “wouldn’t presume” that it was related to Cobell or the three functional areas. (NM 108, 110),<sup>17</sup> and there is no assurance that it would be retained.

Beyond a demonstrable lack of knowledge concerning trust law and principles, McCaleb possessed a poor familiarity with agency directives prohibiting the deletion of trust correspondence. The

---

<sup>15</sup> As of January 16, 2002, “[t]he development of [the] Title History, Realty, Accounting, Appraisal and Probate modules [of TAAMS] has been deferred until business processes have been documented and re-engineered.” Status Report to the Court Number Eight at 124 (January 16, 2002).

<sup>16</sup> The Three Functional Areas include (1) American Indian trust reform, including the High-Level Implementation Plan or any of its subprojects; (2) the Cobell v. Norton litigation; and (3) administration of Individual Indian Money (IIM) accounts. For the purposes of this opinion, the Special Master takes no position as to whether these categories adequately capture the entire corpus of trust information.

<sup>17</sup> It must also be mentioned that the former Assistant Secretary was “not familiar with the Federal Records Act,” (NM 125), and admittedly possessed neither “exact” nor “general” knowledge as to what constitutes a “federal record.” (NM 126). Martin, in contrast, believed the Federal Records Act “requires that we keep documents, federal – which are considered federal records in some form and for certain amounts of time.” (AM 27). Maybee testified that a “federal record” was “pretty much any record that comes in. It is a federal record if it comes in our office,” (JM 56) and her responsibility was “to retain them” (JM 56) even if on an e-mail. (JM 56-57). On that score, Maybee retains all correspondence that she receives or transmits in a box underneath her desk. (JM 83).

Martin testified that she discussed “with each of our senior staff members [Terry Virden, Jim McDivitt, and Jerry Gidner (AM 23)] their need to follow the the Federal Records Act,” (AM 21), “emphasiz[ing] the need to print and file these before deleting.” (AM 21-22). These discussions took place, however, subsequent to the revelation that McCaleb had been deleting his e-mails in October 2002. (AM 23). Prior to that, Martin had no discussions with anyone regarding the agency’s policies, (AM 23-24), recalled no discussions or meetings “that discussed or touched upon Interior’s policy for preserving or retaining e-mails.” (AM 24).

former Assistant Secretary acknowledged that the agency “ha[s] published numerous instructions [“regarding the saving, archiving and deleting of e-mails”] in both printed letters and e-mails.” (NM 62),<sup>18</sup> and insisted that he generally reviewed communications that came from the Office of the Solicitor and the Assistant Secretary-Policy, Management and Budget. (NM 88-89). (And although he had no specific knowledge that “the special master drafted an opinion related to the destruction of e-mails.” (NM 89), he was “generally aware,” (NM 112), that “we were supposed to save” e-mails. (NM 89)).

In practice, however, McCaleb “really didn’t think we had to print” electronic correspondence. (NM 113). He was “not aware of the requirement to print to paper and file all e-mail messages that [he] sent or received.” (NM 116). This was undoubtedly due to the fact that the former Assistant Secretary read neither the August 3, 2001 Memorandum from the Chief Information Officer, (NM 94) (see Attachment 1 at SMREQ0024958), nor the November 28, 2001 Solicitor Memorandum, (NM 112) (sanctioning the deletion of e-mails **only** after they have been printed, filed and saved). See

---

<sup>18</sup> Based on existing office policy, it can not be reasonably disputed that McCaleb was presented with all incoming correspondence and directives. Incoming mail goes to the “Exec Sec office,” (JM 15), who “open[s] the mail and . . . distribute it to the appropriate offices.” (JM 16). Maybee explained that, “if some correspondence comes in that, for instance, goes to Trust Responsibilities, they will put it in [the Trust Responsibilities] mailbox.” (JM 16). The different mailboxes include “Budget, Administration, Trust Responsibilities [“on the Deputy Commissioner’s side . . . deals with land issues, forestry, minerals, . . .”(JM 16-17)], Tribal Services, Public Affairs, Gaming, Congressional and Legislative Self-Governance, American Indian Trust [“on the Assistant Secretary’s side, and they deal with external issues (JM 17)].” (JM 16).

When mail comes in addressed to the attention of former Assistant Secretary McCaleb or Acting Deputy Commissioner Virden, it is forwarded to Maybee, (JM 21), who directs it to “the appropriate in-baskets.” (JM 22). Should the Assistant Secretary be on travel and Maybee receive “a memorandum or directive from the Secretary’s office, or from the Deputy Secretary,” it was Maybee’s practice to “contact Mr. McCaleb to see whether he wanted that forwarded to him immediately.” (JM 25). When Mr. McCaleb is in town, [Maybee] proceeded and placed all correspondence and memoranda . . . in his in-box,” (JM 27), which he goes through on “a daily basis.” (JM 27).

Attachment 1 at SMREQ0024952. As to the first of these directives, McCaleb explained that he had only been in office 29 days when this memorandum was generated and he was confronted at the time with “mountains of policies and information that [he] had not reviewed.” (NM 92).<sup>19</sup> Regarding his failure to review the November 28 memorandum, distributed almost six months after he assumed office, McCaleb explained:

[T]his arrived while I was out of town, I’m specifically aware of that, because on November 28th I was at the National Congress for American Indians meeting in Spokane, Washington. I had injured my leg, I had to leave the convention, I went home to be treated by my doctor. I was gone for most of the following week and when I came back, I had been gone for almost two weeks, and there obviously was a large accumulation of mail, and I will admit to you that I didn’t read every piece of mail that was there.

(NM 113-14).

McCaleb further explained that he was out of the office a great deal of the time which did not “relieve[] him from the responsibility of knowing what was in” the directives, but imposed “a real limitation in terms of time of what [he] could do and what [he] couldn’t do.” (NM 115).<sup>20</sup>

### **III The Former Assistant Secretary Had No Rational Basis to “Assume” That His E-mails Were Being “Saved,” “Preserved” or “Archived.”**

The former Assistant Secretary consistently defended his practice of deleting trust correspondence by attributing it to an “understanding” and an “assumption” that his electronic

---

<sup>19</sup> Had the former Assistant Secretary consulted the August 3, 2001 directive, he might have noticed the statement: “User mailboxes include user “trash” bins because e-mail is saved electronically as long as it is not deleted from ‘trash.’” (Emphasis added.) McCaleb conceded that he was “now” aware that had he not erased the e-mails from his “trash” bin, “they would still be on [his] computer.” (NM 88).

<sup>20</sup> While he was never informed that his “busy schedule as an assistant secretary, . . . relieved [him] of the responsibility of printing” e-mail messages, (NM 118), McCaleb failed to print his correspondence – all the while cognizant that Maybee was also not doing so. (NM 63).

correspondence was somehow being “saved,” “archived” or “preserved.” The first explication of this excuse is set out in the McCarthy Response:<sup>21</sup>

Shortly after Mr. McCaleb was sworn into office, it was his understanding that a Staff Assistant saved his Cobell-related e-mail messages. These are messages relating to American Indian trust reform, including the High-Level Implementation Plan or any of its subprojects; the Cobell v. Norton litigation; and administration of Individual Indian Money accounts. Mr. McCaleb was never informed that his e-mail messages were not being electronically saved.

McCarthy Response at 1 (emphasis added).

McCaleb repeated this position in his subsequent Declaration:

[s]hortly after I was sworn into office on July 4, 2001, it was my impression that my Administrative Assistant was saving my e-mail messages relating to American Indian Trust reform, including the High-Level Implementation Plan or any of its subprojects; the Cobell v. Norton litigation; and administration of Individual Indian Money accounts (hereinafter “Cobell-related e-mails”) (emphasis added).

McCaleb Declaration at ¶3.<sup>22</sup>

The Draft and Approved and Amended Affidavits, that McCaleb swore to as being “accurate,” underscore the identical point:

I believed that my e-mail administration was in compliance with court ordered requirements in the Cobell v. Norton, litigation based on my recollection of

---

<sup>21</sup> McCaleb testified that he discussed the November 8, 2002 response with McCarthy on “[p]robably two” occasions (NM 59) – one meeting lasting approximately “a half hour” and the other “approximately 15 minutes.” (NM 71). Although “there may have been a third meeting,” (NM 73), and, although he was “asked to draft a response to this letter,” (NM 59), he never memorialized his responses to the Special Master’s October 20 questions in writing. (NM 59-60).

<sup>22</sup> McCaleb testified that he created his declaration in consultation with private counsel, (NM 76), without input from the Office of the Solicitor. (NM 76, 95). According to McCaleb, the idea of creating a declaration was his own, and the McCaleb Declaration was not generated in response to the Special Master’s request. (NM 76). McCaleb “thought it would be useful, in consultation with [his] counsel, to set down the circumstances as I remembered them.” (NM 77).

communications I had with my assistant Jean Maybee. It was my understanding that in the period after Thanksgiving through December 2001, Jean Maybee was assuring that my e-mail administration was in compliance with court-ordered requirements, although I cannot recall a specific conversation or agreement that she was doing so.

Draft Affidavit and Approved as Amended Affidavit at ¶ 10 (emphasis added).

Throughout his deposition testimony, McCaleb insisted that he labored under the “assumption” and “understanding” that his electronic correspondence was either being “saved,” “preserved,” or “archived.”

Q. Just so I understand the chronology, on October 10<sup>th</sup> you discovered that your e-mails are deleted; is that correct?

A. Yes. I knew they had been deleted. I thought they had been saved.

(NM 53)

Q: What is the proper procedure for e-mails in your office? What is the proper procedure for printing, saving, filing and archiving, can you tell me?

A. My impression was the proper procedure was that the e-mails that I was doing, that I was sending, were being archived by Miss Maybee.

(NM 61)

Q: So when you said that you did not destroy them, was that based on the assumption that somebody else was saving them?

A. That's right, and that they were recoverable. Destroy implied that they're gone.

(NM 96)

Q: Let's go into what you believe Miss Maybee was to do. What was your understanding of what Miss Maybee was to do vis-a-vis your e-mails?

A. That she was making files and taking the e-mails that related to Cobell and putting those into a file folder and saving them, and in fact she was.

(NM 97-98)

Q: Okay. And to your knowledge, was she filing and saving e-mails that you had deleted?

A. She was filing and saving them before they were deleted.

(NM 98)

- Q: Do you have any distinct recollection of Miss Maybee saying, I will save your e-mails?  
A. No, but in fact she was.

(NM 101).

- Q. And did you ask anybody if they were being preserved?  
A. No. On a periodic basis?  
Q. Let's say on any basis, that they were electronically preserved. That's your language.  
A. Well, I was told that they were being electronically preserved.  
Q. In those words?  
A. Maybe not in those precise words, but they were creating files and putting the e-mails in those files.

(NM 128).

In the view of the Special Master, McCaleb's "assumptions" and "understandings" are fictions aimed at deflecting responsibility from himself and placing it on the shoulders of his assistant. They are entitled to no weight.

- A. McCaleb Could Not Have Rationally "Assumed" That Maybee Was Saving His E-mail "Shortly After" He Encumbered the Position of Assistant Secretary.
- 

At the outset, McCaleb's sworn statements that he "assumed" Maybee was saving his e-mails "shortly after" he took office, (McCaleb Declaration at ¶ 3), or, as stated in his Approved as Amended Affidavit, "[f]rom the beginning of [his] tenure as Assistant Secretary - Indian Affairs." Approved as Amended Affidavit, at ¶ 5, are directly contradicted by his subsequent oral testimony. In his deposition, McCaleb testified that Maybee did **not** advise him she was filing his e-mails, "when [he] first came on in July" 2001, (NM 100), but rather during the "Fall of 2001." (NM 100). Indeed, the first conversation they had concerning e-mails took place after December 5, 2001 – **more than five months** after he assumed office – "[b]ecause we were disconnected from the Internet and before I had

taken my computer laptop with me so I could pick up the e-mails, and now I couldn't do that anymore. And [Maybe] in the conversation advised that she was filing those e-mails." (NM 100). As this was admittedly the first such communication, it is difficult to comprehend how former Assistant Secretary developed his understanding immediately upon assuming office.

B. McCaleb Could Not Have "Assumed" That His E-mails Were Being Saved Based on Any Instruction He Issued.

Irrespective of the point in time when McCaleb "assumed" Maybee was saving his electronic correspondence, the record makes clear he could not have arrived at such an understanding based on any instruction that he issued to that effect. McCaleb testified that he "did not," at any time, "instruct Miss Maybee to file and save [his] e-mails" or to "archive [his] e-mails, or to "preserve [his] e-mails." (NM 98).<sup>23</sup> He never "discussed the policy of the Department of Interior concerning the retention and preservation of e-mails with [her]," (JM 64) (unlike former Assistant Secretary Gover who "may have [] discussed [Interior's e-mail policy] at a director's meeting," (JM 64), or Blackwell, who did "discuss Interior's policy concerning the retention or preservation of e-mails with [her]." (JM 64-65)<sup>24</sup>), and

---

<sup>23</sup> According to Maybee, McCaleb never instructed her to print his e-mails until October 25, 2002 – 15 days after it came to light that he had been deleting his e-mails – when he handed her a document entitled "WHAT IS A FEDERAL RECORD?" (Maybee Exhibit 3) (see Attachment 13), and "told [her] that he wanted [her] to study that document, . . . and that after you study it, he said, [without explanation (JM 61)] [he] want[ed] [her] to start printing off all [his] e-mail every day, at the end of the day." (JM 59, 60). This was "the first time Mr. McCaleb ever instructed [Maybee] to print out e-mails at all." (JM 60). And even then, McCaleb's instruction did not "distinguish between e-mails that related to the three functional areas." (JM 60).

<sup>24</sup> Maybee recalled that , Blackwell "was adamant that we had to make sure that any e-mail relating to the three functional areas was saved and it was something she reiterated time and time again," (JM 65), and reiterated this sentiment not only to Maybee but "to the regional directors" as well. (JM 65).

never “me[ ]t with [his] staff where the topic of discussion was, or a topic of discussion was the preservation and retention of e-mails related to the three functional areas.” (NM 151). In fact, no “directives or memoranda related to the retention or preservation of e-mails related to the three functional areas [have] ever been distributed under [his] letterhead or under [his] name.” (NM 151).

Maybe confirmed that the former Assistant Secretary never issued any directives concerning e-mails, (JM 84, 85) – an observation that was independently corroborated by Martin, who testified that McCaleb never instructed Maybee, (AM 89),<sup>25</sup> or “anybody in the Office of the Assistant Secretary, or anybody else concerning the preservation and retention of his e-mails.” (AM 90).

C. McCaleb Could Not Have Rationally “Assumed” That it Was Safe to Delete E-mails Based on Any Statement Made by Maybee.

McCaleb not only failed to issue any instructions to Maybee, or “anybody in the Office of the Assistant Secretary, or anybody else concerning the preservation and retention of his e-mails,” (AM 90), but the record makes evident that Maybee never offered him any assurances upon which he could have assumed that his correspondence was being saved. When asked whether he possessed “any distinct recollection of Miss Maybee saying, I will save your e-mails,” McCaleb responded, somewhat obliquely, “No, but in fact she was.” (NM 101). Similarly, when asked whether he thought his e-mails “were being archived by Miss Maybee,” (NM 61), based on any statement she made to that effect, the former Assistant Secretary responded: “I can’t say that she said that specific word, no.” (NM 102).

---

<sup>25</sup> On that score, McCaleb “rarely” “interface[d] directly with [Maybee] regarding requests for instructions to be carried out.” (JM 12). He would “usually tell either one of his deputies or his chief of staff and they normally relay it to me.” (JM 11).

The following colloquy between the Special Master and McCaleb, on this point, is revealing:

Q. Reading from Declaration “Prior to October 10, 2002, I was never informed that my e-mail messages were not being electronically preserved.” “Did you ask?”

A. “Well, we discussed it in the fall of ‘01 yes,”

Q. And did you ask anybody if they were being preserved?

A. No. On a periodic basis?

Q. Let’s say on any basis, that they were electronically preserved. . . .

A. Well, I was told that they were being electronically preserved.

Q. In those words?

A. Maybe not in those precise words, but they were creating files and putting the e-mails in those files.

(NM 127-28).

Given the absence of any communication between the former Assistant Secretary and his assistant, the source of McCaleb’s understanding that Maybee was either “saving,” “preserving” or “archiving” his e-mails, remains a mystery.<sup>26</sup>

Maybee provided a more detailed account of the only interaction she had with McCaleb concerning his electronic correspondence prior to October 10, 2002.

According to Maybee, there was “a lull period between Thanksgiving and Christmas. . . and [she] volunteered to go in and review his e-mails, make folders so that he could retain his e-mails in the

---

<sup>26</sup> McCaleb’s explanation that Maybee was saving his e-mails because Maybee so “advised” him, (NM 99), is entitled to no weight since he professed to have “no specific recollection” of the conversation “in which she advised [him],” (NM 99), nor “did [he] have a recollection of how her filing systems operated,” (NM 99), or whether the act of “filing” his messages meant they were being “preserved.” (NM 99).

electronic folders.” (JM 76). She recalled doing so because “[t]here was a backlog of e-mails going back to July 2001 in Mr. McCaleb’s in-box.” (JM 96).

Maybe arranged these folders by topic: “Cobell, Task Force, Trust Reform, TAAMS, TMIP” and for “different pending tribal recognitions” and others. (JM 78). These folders were represented by a series of icons that McCaleb would be able to see when he “would open up his screen, instead of seeing an in-box with, let’s say, 50 e-mails in there, he would now see an in-box with a section for Cobell, with a section for Task Force, with a section for Tribal Recognition” etc. (JM 79). Maybe did not inform McCaleb that she would be printing or backing up his e-mails. (JM 80).

Maybe testified that the entire conversation between the two lasted “[o]ne minute,” (JM 80), during which time McCaleb did not question her “practice of creating folders,” whether she “archived his e-mails,” (JM 84), or whether she “w[as] preserving or retaining,” or “printing any of his e-mails,” “regardless of whether they are [related to the] three functional areas or not.” (JM 85, 86). On this point, Maybee was emphatic:

Q. Was there anything in that conversation that indicated that in putting them in electronic files, that they would be saved forever?

A. Nothing in a conversation.

Q. Did you give him anything in writing that would have given that impression?

A. No.

(JM 104).

In short, Maybee volunteered only to organize McCaleb’s e-mails in a manner that would permit easier access. At no time did she indicate that she was assuming responsibility for the permanent retention of his correspondence.

It is independently telling that McCaleb never verified that his correspondence was being retained. The former Assistant Secretary never performed “any spot checks [] to make sure that [Maybee] was saving or categorizing [his e-mails] in accordance with the direction to save all three functional area documents,” (JM 83-84), and never “ask[ed] [Maybee or anybody] if his e-mail messages were being electronically preserved.” (JM 106-07). Martin did not “recall any incidents during [her] tenure as Deputy Assistant Secretary for Indian Affairs that Mr. McCaleb checked on the status of the preservation and retention of his e-mails.” (AM 90). The former Assistant Secretary simply “assumed” that he could delete trust information from his e-mail folder based on the one-minute conversation between Maybee and him in the Fall of 2001 – details of which he was unable to recall. (NM 99, 101).

D. McCaleb Could Not Have Rationally “Assumed” That it Was Maybee’s Responsibility as a Staff Assistant to Preserve His E-mails.

In response to the Special Master’s question: “Was it Miss Maybee’s job to save your e-mails,” McCaleb responded: “I thought it was, yeah, just as I thought it was her job to handle the filing. She was my administrative assistant.” (NM 106). As demonstrated below, McCaleb’s “assumption” that his Staff Assistant, by virtue of her position, was responsible for “filing the information that comes from my office,” (NM 15), is unsupportable.

Maybee’s responsibilities, as articulated in her job description, do not include the filing of incoming mail – electronic or otherwise. She “coordinates activities with Bureau offices, other Federal agencies, tribal leaders, Congressional staff, Department heads . . . . maintains and oversees discretionary management of the schedules of both the Deputy Commissioner and the Assistant Secretary . . . . [a]rranges special and recurring meetings . . . [and] [o]versees the day-to-day activities

of the office to assure clerical support is provided. . . .” See Job Description for Staff Assistant GS-301-12 (Attachment 14).<sup>27</sup>

In fact, Maybee had never performed any electronic preservation functions for other BIA officials. She did not preserve the correspondence generated or received by former Assistant Secretary Gover, (JM 31), former Deputy Commissioner Hilda Manuel, (JM 31), or any other person. (JM 32). Deputy Assistant Secretary Martin confirmed that none of the assistants in her office performed such a function, (AM 118),<sup>28</sup> and recalled that when she employed a staff assistant, that individual performed no “functions related to [her] e-mail administration.” (AM 117-18).

In sum, McCaleb issued no instructions, received no assurances and performed no verifications to ensure that his trust correspondence was being retained. He possessed “no specific knowledge” whether “any other administrative assistants or staff assistants in the office that saved the e-mails of their bosses, [or] supervisors,” (NM 107), or whether the agency has a policy, “written or unwritten, for staff assistants or administrative assistants to do so,” (NM 107). His attempt to convince the Special

---

<sup>27</sup> An Administrative Support Assistant, by contrast, “[r]eceive[s] correspondence, establish[es] file[s] and review[s] the correspondence for content . . . [i]nsure[s] official receive[s] the document. Establish[es] and maintain[s] procedure[s] for tracking correspondence at all time. . . . [m]aintain[s] files. . . . [r]eceive[s] and open[s] incoming official mail for office.” (Job Description for Administrative Support Assistant GS-303-07). See Attachment 15. Undoubtedly, McCaleb’s confusion on this point stems from the fact the he was unaware that Maybee was a Staff Assistant and not an Administrative Assistant – as he referred to her consistently in his testimony (NM 15, 106) and throughout the McCaleb Declaration, (McCaleb Declaration at ¶ 3) – or from the fact that he was unfamiliar with Maybee’s job description. (NM 16).

<sup>28</sup> According to Martin, “the way individuals in the office of the Assistant Secretary administer their e-mails is really a matter of personal preference,” (AM 119), and there are “no over-arching rules, regulations, policies and procedures that dictate the manner in which that is done” provided “we are fulfilling the policy of printing and filing you e-mails.” (AM 119). “[T]here is no policy that says you all have to do it this way or in a specific manner.” (AM 119-20).

Master that he deleted individual Indian trust records on the “assumption” that it was his subordinate’s task to save his correspondence, is unavailing.

E. McCaleb Could Not Have Rationally “Assumed” That Maybee Possessed the Expertise Necessary to Administer His Trust Information.

McCaleb, when asked how he “expect[ed] Miss Maybee, . . . a GS-12 staff assistant, to know what a trust-related e-mail was,” (NM 103), so that she might ensure him that his e-mail administration “was in compliance with court-ordered requirements in the Cobell v. Norton litigation,” Draft Affidavit at ¶ 10, responded: “[w]ell, she was my administrative assistant and I expected that.” (NM 103).<sup>29</sup> The Special Master finds the former Assistant Secretary “assumption” that Maybee was capable of preserving his trust correspondence – an act that presupposes that she was capable of distinguishing whether or not a communication contained trust information – to be implausible.

In the first instance, it defies logic that McCaleb would repose confidence in Maybee’s ability to differentiate between trust and non-trust records based on nothing more than her title as “administrative assistant,” when, by his own admission, he never issued any “instruction or direction . . . on how to tell was a Cobell-related e-mail was versus another one.” (NM 103). It further defies

---

<sup>29</sup> McCaleb later clarified:

- Q. Did your discussion with Miss Maybee during this November 2001 time frame discuss specifically messages relating to the American Indian trust reform?
- A. Yes, I think they did, but I don’t really recall. I think she was trying to save not only Cobell-related e-mails, but e-mails she thought that I had not dealt with.

(NM 102-03).

reason, given the former Assistant Secretary's own limited grasp of trust principles, admitted inability to distinguish between trust and non-trust programs, (NM 107-108), and acknowledgment that a "universal definition" of Indian trust records does not exist, (NM 40), that he would expect his Staff Assistant to possess such expertise.

Indeed, "a lot of times," Maybee **was** unable to distinguish between a Cobell and a trust reform document. (JM 116-17). She explained that never "received any instructions on how to distinguish a document that was Trust-Reform related," (JM 117), or had "been given an instruction, or attended a seminar, or read any memorandum or directive that told you what an Indian Trust document was." (JM 117). She never received any "training concerning federal records policy," (JM 63), from McCaleb or anyone else, or "training concerning the retention and preservation of e-mails," (JM 63-64), "related to the three functional areas or otherwise." (JM 64).<sup>30</sup>

On this record, the Special Master finds that, at minimum, it was reckless for McCaleb to assume that Maybee was endowed with the necessary skills to administer his trust records and ensure that his e-mail administration "was in compliance with court-ordered requirements in the Cobell v. Norton litigation." Draft Affidavit at ¶ 10.

F. McCaleb Could Not Have Rationally "Assumed" That it Was Safe to Delete His Electronic Correspondence Based on the Actions of His Colleagues.

---

The record suggests that, not only was McCaleb unable to "assume" that it was safe to delete trust records from his e-mail file based on explicit communications to that effect or the job titles of his

---

<sup>30</sup> Maybee's situation was not unique. Martin testified that she, too, "ha[d]n't attended any" meetings where the definition of Indian trust records was a topic of conversation and "d[id]n't recall ever reviewing" any document "that purports to define Indian trust records." (AM 113-114).

subordinates, but the former Assistant Secretary might have arrived at a different conclusion had he observed the manner in which his colleagues administered their e-mails.

For example, had McCaleb observed Deputy Assistant Secretary Martin, he would have noted that she “saved all of [her] e-mails since December [2001],” (AM 78), and ensured that “[t]hey [were] printed and they [were] filed in four categories: Trust Reform, IIM, and Cobell v. Norton, and Miscellaneous.” (AM 78). Martin testified that she “personally keep[s] every e-mail that refers to trust reform, the trust reorganization, the high-level implementation plan, scheduling for meetings that discuss any of those issues, scheduling for any meetings that have to do with trust litigation or Cobell v. Norton, or that have to do with IT or individual Indian money.” (AM 78). By her own account, she retains “additional documents which have to do with the individual tribal trust cases, any kind of meetings that have to do with any of those things,” (AM 78), and, out of “abundance of caution,” keeps all incoming and outgoing e-mails and “delete[s] almost none of [her] e-mails.” (AM 78).<sup>31</sup>

Had McCaleb inquired of Maybee, he would have discovered that Gover, her former supervisor, would “read and print his e-mails every day and [] would note on the top right-hand corner

---

<sup>31</sup> Martin testified that she was able to employ such a regimen without the benefit of direct instruction or direction. (AM 81). She learned through “general conversations . . . about the need to keep, retain e-mails,” (AM 81) (see fn. 3), and by complying with “the pop-up screens when we are backed up which outline the areas for which we are supposed to keep e-mails,” (AM 81), (Martin Exhibit 10) (see Attachments 3-4) – the last one of which she recalls receiving on October 4, 2002. (AM 82). See Attachment 4 (SMREQ0025065). She professed to be cognizant of “a court order in the Cobell v. Norton litigation which requires us to file – print, file, and save all e-mails relating to these matters,” (AM 21), that she believed “was based on earlier discoveries that e-mails were not being retained appropriately.” (AM 25). Martin also cited to the existence of “other federal policies regarding document retention” that which provide, “[d]epending on what your agency policy is, [that] there is a certain amount of time for which you are required to retain all documents.” (AM 26).

where he wanted those to be filed. He would put them in a file basket, and when we had a staff person that would come in and he would request them to file, they would put them in the appropriate files that he had put on the top.” (JM 32).

Similarly, had the former Assistant Secretary observed former Deputy Commissioner Sharon Blackwell – a reported “fanatic when it came to her e-mails.” (JM 39), he would have noted that it was her practice to “print them . . . . save them . . . . put them on CDs . . . . put them in little electronic folders, [and] . . . print them again.” (JM 39). (Maybe recalled that the former Deputy Commissioner undertook this “fanatical process,” (JM 39-40), due to the “Cobell Court Order.”<sup>32</sup> (JM 40)).

Indeed, had McCaleb followed Blackwell’s advice, the Special Master’s investigation might have been avoided altogether.

Maybe recalled two occasions when Blackwell “discuss[ed] [] Interior’s policy concerning the retention and preservation of E-mails with Mr. McCaleb.” (JM 65-66).<sup>33</sup> After the first meeting, which took place, “probably in November 2001,” (JM 69), Blackwell emerged from McCaleb’s office and “appeared to be frustrated and she said that she had talked to Mr. McCaleb in reference to the e-mails, his e-mails and told him how she has always been very careful on what she saves and how she saves it, and that he needed to also retain his documents and e-mails in particular. And she said that

---

<sup>32</sup> According to Maybee and Martin, Acting Deputy Commissioner Terry Virden also “prints off his e-mail.” (AM 87) (JM 40).

<sup>33</sup> McCaleb confirmed that he had “probably more than one” conversation with Blackwell, (NM 104), in which Blackwell conveyed “in form or in substance” that “it’s important to retain Cobell-related e-mails.” (NM 105).

she got the impression that he wasn't very worried about it." (JM 67-68). According to Maybee, Blackwell exclaimed that McCaleb "doesn't get it," (JM 68).

After the second meeting, that took place, "[p]robably [in] the spring of 2002," (JM 69), Blackwell related to Maybee that,

she had gone in and talked to Mr. McCaleb about what she needed to do to prepare her office for her departure. And she again told him that she needed to go and make sure that she had all of her e-mails in order, and I believe she told him what she intended to do in having staff come in on weekends. And she was going to be working weekends and late in the night, in order to get all of her e-mails in place and filed away before she left.

(JM 70).

Maybee recalled that, following this meeting, Blackwell was "holding her head and shaking it," (JM 70), over "this lack of concern about the e-mails." (JM 71).

In sum, the former Assistant Secretary not only failed to read Interior's directives, pay attention to the notifications that appeared regularly on his computer, issue instructions to his staff or verify that his "assumptions" were well grounded, but he refused to observe the record-retention practices of others in his office and listen to sound advice. In the view of the Special Master, McCaleb bears direct responsibility for any consequences flowing from the destruction of trust information.

F. McCaleb's "Assumption" That it Was Safe to Delete E-mails Because They Were Being Electronically Captured Is Not Credible.

In addition to his repeated litany that he deleted his correspondence on the "understanding" that it was being "saved" by his assistant, McCaleb indicated that he "would not have deleted e-mail if [he] had not believed that it was backed up." Draft and Approved as Amended Affidavits at ¶ 9. As demonstrated below, this excuse is also unworthy of credence since, at the time he deleted his

correspondence, McCaleb was unfamiliar with the very backup procedures on which he purportedly relied.

The record indicates that, in “the late spring or early summer of 2002,” McCaleb received a computer message stating that his e-mail file had “exceeded the maximum memory threshold,” and that he “began immediately deleting all e-mail messages that were not Cobell-related.” McCarthy Response at 1; McCaleb Declaration at ¶ 5 (emphasis added).

Six months later, however, McCaleb admitted that he did not “have any specific knowledge of” the “Department policy for recovering and capturing e-mails.” (NM 96):

- Q. What’s the Department policy for recovering and capturing e-mails, do you know?  
A. I don’t have any specific knowledge of that.
- Q. Well, tell me what it is generally.  
A. I was under the impression, I was told that we were making backup tapes of all the e-mails. I was also told by my administrative assistant that she was making files.
- Q. Let’s go through the policy of backups. I have to focus your attention on the question asked. What is the policy, can you state it in either form or substance, what is the Department of the Interior’s policy concerning the capture and backup of e-mails.?  
A. That backup tapes are made for all e-mails.
- Q. And how often does this happen?  
A. I have become aware recently that they are backed up weekly.
- Q. Were you aware of that at the time that you were deleting these e-mails?  
A. Not specifically that they were backed up weekly.
- Q. Then how could you assume – you testified earlier that you assumed that they were backed up.  
A. Because I would leave them on there for a couple of weeks.
- Q. But again, if you didn’t know what the policy for backing up was, how can you possibly make such an assumption?  
A. I did make that assumption.

- Q. Was it based on something you read?  
A. I don't know.

Deposition of Neal McCaleb at 96-97 (December 6, 2002).<sup>34</sup>

In other words, the former Assistant Secretary asks the Special Master to accept that he deleted e-mails on the "belief" they were being backed up in conformity with a policy with which he was unfamiliar. The Special Master places McCaleb's "backup" rationale on an equal footing with his "assumption" that Maybee was preserving his correspondence. Neither is credible.

**V The Evidence Indicates That McCaleb's Deleted E-mails Were Destroyed.**

Contrary to McCaleb's suggestion that his deleted e-mails "were recoverable" and not "destroyed," (NM 96), the evidence indicates that the information he erased was most likely not captured on Interior's backup system and that any tapes that may have captured this information were most likely overwritten.

Martin's testimony yielded the following testimony:

- Q. Okay. Are you familiar with Interior's system for backing up e-mails?  
A. I am familiar with generally how the Bureau of Indian Affairs' system works.  
Q. How does it work?

---

<sup>34</sup> McCaleb later recanted and attributed his assumption that "he was leaving his e-mail messages on the computer until they were captured by a backup," (NM 121), to a conversation he had with Associate Deputy Secretary James Cason (NM 121) "well before" it was discovered that he was deleting his e-mails. (NM 122). This conversation supposedly came up "in a discussion of records retention in the Cobell lawsuit." (NM 122). However, McCaleb was unable to offer a time frame or describe the particulars of this conversation. The Special Master therefore chooses to give it no weight.

- A. Now, we back up our e-mail daily. And we are in the process of implementing a contract with Zantaz to have live capture of all our e-mail; that is, all e-mail that is sent or received within the BIA will be captured as it is sent or received.<sup>35</sup>
- Q. And prior to Zantaz, do you know what the policy and procedures were of the BIA concerning the capture of e-mails?
- A. Prior to Zantaz, we were to have been backing up our e-mail every day.
- Q. Do you know whether or not these tapes upon which these e-mails were backed up were retained for any period of time?
- A. They were supposed to have been retained indefinitely.
- Q. Do you know if they were?
- A. They were not.
- Q. How do you know?
- A. Subsequent to our discovery with regard to Mr. McCaleb's e-mail, we conducted an investigation. We – actually, the Associate Deputy Secretary, Mr. Cason, conducted an investigation into our e-mail retention practices that is within our system.
- Q. And when did he conduct this investigation?
- A. I believe subsequent to October 17<sup>th</sup>. During that next week.
- Q. Do you know what he uncovered?

---

<sup>35</sup> Interior entered into a contact with Zantaz after the Special Master approved the Department's proposal to utilize that company in connection with its duty to retain electronic copies of e-mail messages. See Special Master Opinion (September 25, 2002 filed on January 17, 2003). The Special Master found that Zantaz, the contractor identified in the e-mail proposal, "possess[ed] the technology and skill necessary to capture, archive and search Interior's e-mail transmissions. Zantaz' ability to initiate multiple search variations, accommodate additional bureaus and offices, capture all sender and recipient information, and archive all information in a secure environment render it an appropriate candidate for implementing the E-Mail Proposal." Opinion at 6.

A. We learned that the Bureau of Indian Affairs was not making daily backup tapes, that there were – that we were conducting weekly backups.

Q. Go ahead.

A. And that some of the tapes had been – from prior backups, had been taped over.

(AM 83-85) (emphasis added).

Martin's testimony is independently supported. During McCaleb's tenure, BIA employed two backup procedures. One backup was presaged by notifications "that the e-mail has been backed up" and it was safe to "print, file and delete the e-mail up until that date." (JM 41). (AM 82-83). These notifications, which would "come out on every employee's computer, (JM 42), sporadically between December 28, 2001 and October 4, 2002, stated, in pertinent part: **"DO NOT delete any E-Mail pertaining to the above three subject categories Received After [inserted date] until you receive another message similar to this one indicating the retention Backup has been successful."** (emphasis in original, bold added) (Attachment 4 at SMREQ0025065).<sup>36</sup>

The agency also performed daily backups of its electronic transmissions. However, "from March 26, 2001 to October 17, 2002, only the Friday backup tapes for the BIA e-mail servers have been retained." McCarthy Response at 2 (emphasis added). A letter sent to the Special Master on December 18, 2002 confirmed that, "daily backup tapes of the BIA e-mail servers were made during

---

<sup>36</sup> See notifications dated January 4, 2002 (SMREQ0025451); January 11, 2002 (SMREQ0025452); January 18, 2002 (SMREQ0025453); January 25, 2002 (SMREQ0025454); February 1, 2002 (SMREQ0025054); February 8, 2002 (SMREQ0025055); February 22, 2002 (SMREQ0025056); March 1, 2002 (SMREQ0025057); March 29, 2002 (SMREQ0025058); April 12, 2002 (SMREQ0025059); April 19, 2002 (SMREQ0025060); June 14, 2002 (SMREQ0025061); July 5, 2002 (SMREQ0025062); August 16, 2002 (SMREQ0025063); August 23, 2002 (SMREQ0025064); and October 4, 2002 (SMREQ0025065). (Attachment 4).

this period, but only the Friday tapes were retained. The Monday through Thursday tapes were overwritten.” Letter from Department of Justice Attorney Amalia D. Kessler to Special Master Alan Balaran (December 18, 2002) (emphasis added).<sup>37</sup> This situation was ultimately remedied, but only after McCaleb’s malfeasance was discovered. See McCarthy Response at 2, n. 2 (“As of October 17, 2002, BIA e-mail administrators were instructed in an e-mail message that all Lotus Notes Domino Servers carrying BIA e-mail are to be backed up every day, Monday through Friday, and backup tapes are not to be reused or overwritten.”).

Despite the fact these tapes were overwritten, the agency maintains that, (1) “[g]iven Mr. McCaleb’s practice of saving his *Cobell*-related e-mail messages for at least a couple of weeks, we do not anticipate that he deleted any e-mail messages before they were captured on a Friday backup tape,” and (2) even if McCaleb’s erased e-mails can not be recaptured, they can be recovered “since the message may appear on the tapes both in the sender’s e-mail account and in Mr. McCaleb’s e-mail account.” McCarthy Response at 2.

The Special Master takes no comfort from either possibility.

As a general matter, the Special Master places little stock in McCaleb’s assertion that he saved his “Cobell-related” e-mail messages for any additional length of time. Beyond this, the Assistant Secretary was, by his own admission, incapable of “distinguish[ing] between an e-mail that falls within

---

<sup>37</sup> This is supported by Martin’s notes of an October 17, 2002 meeting with the Associate Deputy Secretary and others where she wrote that “each administrator backs up each server daily M-F. Tapes for each weekday are recycled on that same day the next week, except Fridays, which are retained.” Martin continued: “Backup occurs in evening or early morning. Request for backup ‘\$ a problem, I’ll get back to you.’” Martin Exhibit 3 at 4. See Attachment 16. Several pages later, Martin noted: “Prior to 3 months - no backup M-Th . . . 3 months to present - possible to restore.” Martin Exhibit 3 at 6 (emphasis added).

one of the three functional areas or one that does not.” (NM 107). Since “Cobell-related” e-mails constitute one of the Three Functional Areas that McCaleb was obligated to preserve and, by his own account, McCaleb purportedly saved only “Cobell-related” correspondence, it is likely that the former Assistant Secretary mistook a “Cobell-related” e-mail for one of the other categories, (i.e., “American Indian Trust Reform, including the High-Level Implementation Plan or any of its subprojects” or the “administration of Individual Indian Money accounts,” (McCaleb Declaration at ¶ 3)), and deleted it.

Moreover, when McCaleb was in office, e-mails were captured on BIA’s system on Fridays or the sporadic occasions noted above. If McCaleb deleted his trust correspondence before a notification appeared informing him that it was safe to do so, between notifications, or on any week day other than Friday (such as on a Thursday – the very day Maybee discovered that McCaleb was deleting the OIRM Morning Reports), that information would not have been captured.

Finally, the possibility that Interior might be able to recreate the destroyed trust information by combing through the e-mails files of other Interior officials who communicated with McCaleb offers little solace as it presupposes that those correspondents were not equally remiss in the administration of their electronic correspondence. Given the lack of any “training concerning federal records policy,” (JM 63); or “training concerning the retention and preservation of e-mails,” (JM 63-64) (AM 24); or training “related to the three functional areas or otherwise.” (JM 64); and the absence of any “over-arching rules, regulations, policies and procedures that dictate the manner in which” e-mails are administered (AM 119), such confidence would be misplaced.<sup>38</sup>

---

<sup>38</sup> After October 10, 2002 – the day McCaleb’s actions came to light – “all political appointees were required to go through a meeting on records retention.” (AM 24). Martin personally attended “one meeting on records retention and on trust records retention.” (AM 25). She was aware

## **VI McCaleb's Version of the Events that Took Place on October 10, 2002 Are Not Supported by the Record.**

The Special Master finds McCaleb's testimony concerning the events that led to the discovery that his trust correspondence was being erased, particularly suspect.

The deletion of the former Assistant Secretary's e-mail was discovered on October 10, 2002, when, "in preparation for a scheduled deposition, anticipating questions regarding e-mail issues, Mr. McCaleb verified with the Staff Assistant that his e-mail messages had been saved, as required." McCarthy Response at 3. It was "[d]uring this conversation [that] Mr. McCaleb discovered that the Staff Assistant had not been electronically storing his e-mail messages on a regular basis." McCarthy Response at 3.<sup>39</sup>

According to McCaleb,

On October 10, 2002, in preparation for a scheduled deposition, anticipating questions regarding e-mail issues, I spoke with my Administrative Assistant to confirm that my e-mail messages had been saved as required. It was during this conversation, that I first discovered that my Administrative Assistant had not been electronically storing my e-mail messages on a regular basis, as I had previously believed.

McCaleb Declaration at ¶ 7.<sup>40</sup>

---

of the existence of directives mandating that e-mails be printed, filed and saved, such as that which issued from the Solicitor's Office and the "routine message that we receive on our backup notices." (AM 22). McCaleb was, unfortunately, "absent," (NM 119), from the one weekly meeting between the Secretary and her assistants that discussed "retention, filing and preservation of e-mails" took place "subsequent to the revelation of this event on October 10<sup>th</sup>." (NM 119).

<sup>39</sup> The deletion was described as having been "jointly discovered" by "Mr. McCaleb and the Staff Assistant," during "their conversation on October 10, 2002." McCarthy Response at 3.

<sup>40</sup> Both the Draft Affidavit and the Approved as Amended Affidavit are silent concerning the events of October 10.

During his deposition, McCaleb offered a “more accurate description” of these events. (NM 135). He explained that, on October 10, “[he] was in the process of cleaning up the computer and deleting some e-mails, and [he] had had this, you know, question in [his] mind about what [he] was going to be queried about, and [he] thought that well, I’d better assure myself that we had all the e-mails. And that’s when [he] raised the issue with Miss Maybee.” (NM 136-37). The former Assistant Secretary testified that he “began to systematically delete some of these sent e-mails in order to gain capacity, . . . that’s when [he] asked Mrs. Maybee, before [he] eradicated all these sent e-mails, [he] asked her about the backup at that point. When she said that she had not, [he] stopped at that point.” (NM 83-84).

McCaleb recounted that, on October 10, 2002, he “call[ed] [Maybee] in the office,” (NM 137), asked: “are all of my e-mails [] backed up,” (NM 137), and “specifically asked as an example, do we have all the morning reports.” (NM 137). The former Assistant Secretary testified that he chose the OIRM Morning Reports as an “example” because “it was something that came out every day,” (NM 137), and that would be “a test” “for the recoverability of the e-mails.” (NM 141). He did not ask for any other “examples.” (NM 137). McCaleb insisted that he was “trying to assure [himself] that the[y] were in fact recoverable, all the e-mails were recoverable.” (NM 141-42).

McCaleb’s recitation of the events of October 10, 2002 is directly refuted by the testimony of his Staff Assistant who, when asked to confirm whether the former Assistant Secretary “spoke with [her] . . . to confirm that [his] e-mail messages had been saved as required,” (McCaleb Declaration, at ¶ 7) (JM 107), succinctly responded: “It is not a true statement.” (JM 108).

On October 10, 2002, Maybee recalled entering McCaleb's office "to drop off [some] documents in his in-basket. (JM 109). McCaleb "was sitting at his computer screen," (JM 109), turned to Maybee and asked: "Jean, am I supposed to be printing this document before deleting it." (JM 109).<sup>41</sup> Maybee "walked over, around the side where [she] could view his computer screen and the document on the screen [the OIRM morning report] appeared to be a document that we should be retaining." (JM 109). She looked at McCaleb's screen and responded: "Yes." (JM 110). According to Maybee, McCaleb directed her "to get ahold [sic] of someone in OIRM and have the OIRM morning report restored to his computer. And if [she] could not get it restored to his computer, that [she] needed to have them send [him] a hard copy of all of the OIRM morning reports." (JM 110-11). "[A]lthough Mr. McCaleb had specifically requested the OIRM morning report be restored," she took it upon herself to "request[] all e-mails to be restored out of an abundance of caution and because of the Court Order mandating that all Trust e-mails be maintained." (JM 114). She insisted that she acted "on [her] own," and that it was she who "requested all e-mails to be restored," and "not Mr. McCaleb." (JM 115).

For the following reasons, the Special Master credits Maybee's version of events.

---

<sup>41</sup> McCaleb denied that such a conversation took place.

Q. Did you ask her during this conversation whether or not you should have printed the OIRM report before deleting it?

A. No, I don't remember asking that.

Q. It's possible you did?

A. No, I don't think so.

(NM 137-38)

At the outset, the Special Master finds it curious that, notwithstanding statements offered in the McCarthy Response, the McCaleb Declaration and both the Draft and Approved as Amended Affidavits, McCaleb waited until his deposition to more “accurately” depict the events of October 10, 2002.

Beyond this, the Special Master believes it inconceivable that McCaleb, a senior official with no technical expertise who has ignored every court order and agency directive concerning the preservation of electronic correspondence would, on his own initiative, test “for the recoverability of the e-mails,” (NM 141), in an effort “to assure [himself] that . . . all the e-mails were recoverable.” (NM 141-42) – especially given his stated “assumption” that both Maybee and the OIRM had been retaining his e-mails “[f]rom the beginning of [his] tenure as Assistant Secretary - Indian Affairs.” Amended as Approved Affidavit, at ¶ 5.

The Special Master also does not believe that, on October 10, 2002, McCaleb was anticipating “questions regarding e-mail issues,” (McCaleb Declaration at ¶ 7), that may arise concerning the retaliation complaint lodged by Interior employee Mona Infield. The only information McCaleb possessed at that time concerning the Infield matter turned out to be wholly unrelated to “e-mail issues.” All McCaleb knew was that Infield “was an employee of the Bureau of Indian Affairs,” (NM 131), who “had been asked to move from Albuquerque to work in Reston, that she didn’t want to, . . . and that she was retaliated against somehow in relationship to that whole controversy.” (NM 131). McCaleb was also aware that the Infield deposition “had something to do with OIRM,” (NM

132), and “something to do with retaliation of some sort” (NM 132) and that “Miss [I]nfield was on paid leave.” (NM 132). “That’s it.” (NM 131) (emphasis added).<sup>42</sup>

In addition to having no substantive knowledge concerning the particulars of the Infield complaint, the evidence indicates that when he consulted with the Department of Justice and the Office of the Solicitor concerning the Infield deposition, “the discussion centered around the fact that [he] had no personal firsthand knowledge,” and he was specifically advised that, “there was little reason for [him] to become educated on something [he] didn’t have any knowledge of, by third parties.” (NM 146) (emphasis added).<sup>43</sup> In short, McCaleb would convince the Special Master that, on October 10, 2002, he was acting against the advice of counsel by researching issues unrelated to his upcoming deposition.

Maybee’s account, in contrast, is inherently logical and was independently corroborated by Deputy Assistant Secretary Martin, who testified that Maybee’s version of the “circumstances [] that led to [McCaleb] recognizing that the OIRM Morning Report had been deleted,” (AM 99), “square[d] with what [Martin’s] understanding was from [the Assistant Secretary].” (AM 99) (emphasis added).

Martin testified that she became aware of the deletion of e-mails on October 15, 2002, (AM 18, 73), when she was informed by McCaleb’s Chief of Staff Jerry Gidner, (AM17), that “he had a

---

<sup>42</sup> In addition to “e-mail issues,” McCaleb, “was anticipating questions about a plethora of issues relative to the Cobell case,” (NM 134), including, “[t]he reorganization of the Bureau of Indian Affairs within the Department of the Interior. The BITAM proposal. The consultations. The task force activities,” (NM 134).

<sup>43</sup> More preposterous is the fact that, notwithstanding his “anticipation” that he was to be asked “all kinds of questions,” he requested no other documents to review, (NM 145, 146), nor did he indicate, for example, to Deputy Assistant Secretary Martin “in preparation for this deposition October 14, 2002, [that] he would need to review certain documents.” (AM 72).

discussion with Jean Maybee, and that she disclosed to him that Mr. McCaleb wanted to restore an e-mail [OIRM Morning Report (AM 18)] that he had deleted before printing it and filing it.” (AM 18) (emphasis added).<sup>44</sup> Upon learning of the deletion, Martin contacted McCaleb, who was on travel at the time, “trying to find out which e-mail he had deleted and when it had been deleted.” (AM 20-21) (emphasis added). According to Martin, “I asked [McCaleb] about the document that had been deleted. He said that he had asked Jean “to have it restored.” (AM 74) (emphasis added). She then inquired “if there might be other e-mails that he may have deleted” to which McCaleb responded “generally, that he may have deleted other e-mails.” (AM 74).<sup>45</sup>

In sum, the Special Master finds that, on October 10, 2002, McCaleb was not engaged in computer housekeeping. He did not “call[] [Maybee] in the office” (NM 137) and inquire: “are all of my e-mails [] backed up?” (NM 137). He did not ask for the OIRM Morning Reports “as an example” (NM 137) to test for their “recoverability.” And contrary to his testimony that he directed

---

<sup>44</sup> Maybee informed Gidner of the e-mail deletion on October 10, 2002; (see Attachment 17 at 1); Gidner informed Martin on October 15, 2002; and Martin reported the incident to Associate Deputy Secretary Cason the next day. (AM 101). To his credit, Cason directed Martin to “gather more facts” (AM 102), determine whether the lost e-mails could be restored and inform the Court. (AM 103).

<sup>45</sup> Martin testified that she further inquired whether “the e-mails were trust-related or what kinds of e-mails he was deleting,” to which McCaleb “advised” her “that he had been deleting e-mails that were not trust-related for some time.” (AM 74). According to Martin, McCaleb “made the assessment” that the e-mails he deleted were not “trust related.” (AM 107). As Martin was keenly aware at the time, the OIRM Morning Report was “a trust document,” (AM 74), and McCaleb’s response “that he was not deleting trust records . . . was not an accurate statement.” (AM 74). Martin testified that McCaleb was “aware that the OIRM Morning Report was a trust document,” (AM 75), and did not inform the former Assistant Secretary of that during “that conversation.” (AM 75). The Deputy Assistant Secretary could not “recall if it was this specific discussion that we had on the 15<sup>th</sup> where I would have been advised that he was also deleting trust e-mails after a certain amount of time.” (AM 76).

Maybe to reconstruct “any and all Cobell-related e-mail,” (NM 60), the former Assistant Secretary asked only to have his OIRM Morning Report reconstructed. (Maybe Exhibit 5 at 1). See Attachment 17. Rather, the former Assistant Secretary crafted his version of that day’s events to create the facade that he was acting in conformity with agency policy and studiously preparing for an upcoming deposition. His account is not believable.

**V Martin Assisted McCaleb in the Creation of His Fictional Account.**

One remaining issue merits discussion – the creation of the Draft Affidavit by Deputy Assistant Secretary Aurene Martin. The record reflects that, on October 17, 2002, Martin telephonically questioned the former Assistant Secretary regarding the deleted e-mail, (AM 36, 37) (Attachment 16), and, while she did not commit his responses to paper, after “[she] spoke to him, [she] believe[d] [she] typed up the draft affidavit” (AM 38).

While the creation of an affidavit, without more, is of no moment, Martin’s conduct raises several concerns.

At the outset, Deputy Assistant Secretary Martin never served as McCaleb’s legal representative. By her own admission, the two did not share confidences protected by the attorney-client, work-product, or deliberative-process privileges. (AM 14). Indeed, such a representation would have constituted a violation of Interior regulations that demand that agency employees be represented by the Office of the Solicitor. See 109 DM 3.4C (The Solicitor is responsible for “[p]rovision of all legal services to. . . the Assistant Secretaries and to its officials and employees of the Department in connection with action proposed or taken under the Department’s programs. . . .”) (emphasis added).

When asked why she would generate a legal document for McCaleb's signature, Martin responded that she "automatically assumed" that she "should create an affidavit" (AM 41) because "it pertained to a matter that was in litigation. And I felt that the subject matter was serious enough that Mr. McCaleb should have a sworn statement to – as to what he believed the situation to be." (AM 41-42).<sup>46</sup> She "also felt that Jean [Maybee] needed to memorialize her understanding as well." (AM 41).

Second, Martin's preparation of the Draft Affidavit was without precedent. According to her testimony, the Draft Affidavit represented one of only two affidavits generated by the Deputy Assistant Secretary since being appointed to that position. And unlike the first, that was written at the explicit direction of counsel and in support of a pending litigation, the Draft Affidavit was one Martin was neither "asked to provide," (AM 40), nor instructed to prepare. (AM 46).

Third, Martin did not "discuss the fact that [she] w[as] preparing a draft affidavit for Mr. McCaleb's signature with anybody at the . . . Office of the Solicitor" or "from the Department of Justice" (AM 42) – the two agencies with exclusive authority to represent the interests of the Secretary and the United States. (AM 16). Instead, Martin consulted with McCaleb's private counsel, (AM 43), and "informed [them] that there was the possibility that Mr. McCaleb had deleted some emails; that I had had discussions with him which indicated that there were possibly a number of e-mails that had been deleted, and that I had prepared an affidavit for his signature." (AM 46-47). Martin could not explain why she contacted McCaleb's personal counsel and not the Office of the Solicitor or the

---

<sup>46</sup> Martin's decision to create an affidavit without prompting is curiously similar to McCaleb's decision to sua sponte draft a declaration without being asked to do so. See fn. 22, above.

Department of Justice, (AM 44), considering the only prior contact she had with McCaleb's personal counsel was "with regard to a scheduling matter." (AM 44).

Fourth, it appears that Martin and McCaleb did not confer regarding the preparation and editing of the Draft Affidavit. Martin "told [McCaleb] that [she] felt that we needed to have some documentation of the situation which was close in time to the initial disclosure." (AM 41) According to Martin, McCaleb knew, authorized and asked Martin to contact his personal counsel regarding the e-mail situation, (AM 47), she informed the former Assistant Secretary that she "intended to" create an affidavit for him to sign, (AM 41), and McCaleb was "[a]ware that [Martin] was creating a document for him." (AM 41). After Martin presented the former Assistant Secretary, (AM 47-48), and McCaleb's counsel, (AM 96-97), with a copy of the Draft Affidavit, McCaleb reviewed and edited it, but his changes were never memorialized, (AM 49), for reasons Martin was unable to recall. (AM 50).<sup>47</sup>

McCaleb, however, professed he "did not know [in] what capacity [Martin] prepared" the Draft Affidavit, (NM 78), and, notwithstanding the fact he amended the document and approved it with his changes, he never discussed the Draft Affidavit with her. (NM 79-81). And although the Draft Affidavit represented the first such document that Martin prepared for him, (NM 80), McCaleb testified he did not "ask her any questions concerning [its] origin," (NM 81), nor did he "discuss the contents" with her. (NM 82). Rather, he recounted that Martin presented him with the Draft Affidavit upon his

---

<sup>47</sup> Martin testified that she, too, modified the Draft Affidavit ("Martin Draft Affidavit") (Martin Exhibit 6) (see Attachment 18), changing Paragraph 5, which originally read, "I retained all e-mails that I received in my 'Inbox' on my e-mail account," to "my assistant Jean Maybee retained all e-mails that I received in my 'Inbox' on my e-mail account." Martin Draft Affidavit at ¶ 5; (AM 58, 59). Martin made this change notwithstanding Maybee's testimony to the contrary.

return from a road trip “about the 20th of October,” (NM 79), “for [his] consideration.” (NM 79). The former Assistant Secretary insisted he had no idea “what inspired [Martin] to create [the Draft Affidavit], (NM 78), did not “instruct her to create such a document,” (NM 79), “ask her to create such a document,” (NM 79), or knew if anyone else did (NM 80). McCaleb did, however, discuss the contents of the Draft Affidavit with his “personal counsel,” (NM 82), but not with the Office of the Solicitor or with the Department of Justice. (NM 83).

Fifth, although Maybee was a key player in the events that led to the deletion of McCaleb’s correspondence and sole witness to the discovery that the former Assistant Secretary was erasing his e-mails, Martin did not ask her to “verify the contents contained” in the draft affidavit, but only to “look at it, and if she had changes or something that she wanted to discuss about it, to let [her] know,” (AM 60), and “prepare her own statement which would outline what she believed the situation to be.” (AM 60). See Attachment 17.<sup>48</sup> Martin testified she wanted Maybee to draft a statement “because the situation was reported to the court, that there would be some point in the future where there would be questions about it, and I wanted there to be a record for her purposes as well as Mr. McCaleb’s purposes.” (AM 120). Martin did not, however, incorporate Maybee’s statement in McCaleb’s Draft Affidavit or generate a separate affidavit for Maybee’s signature, (AM 62) – notwithstanding her awareness that McCaleb’s and Maybee’s statements conflicted. She recalled speaking to both regarding this disparity, (AM 61), and questioning Maybee “as to why her version differed from that of

---

<sup>48</sup> On this point, Martin stated, somewhat implausibly, that she did it “partially” to protect Maybee’s interest – even though she ultimately omitted Maybee’s conflicting version of events from the Draft Affidavit. Presumably, this was because, as she later acknowledged, Maybee’s statement “may not be in [McCaleb’s] interest.” (AM 120-21).

the Assistant Secretary for Indian Affairs.” (AM 65). Nonetheless, Martin prepared the Draft Affidavit without Maybee’s input – knowing that the it would be signed “under penalty of perjury.” (AM 64).

In sum, the Special Master finds it troubling that Martin, a Deputy Assistant Secretary in charge of policy, (1) generated an affidavit, in contravention of Interior regulation, for the signature of the Assistant Secretary, without being asked to do so;<sup>49</sup> (2) did not consult with the Office of the Solicitor or the Department of Justice of her intent to do so, but contact McCaleb’s personal counsel instead; (3) did not consult with McCaleb concerning the representations made in the Draft Affidavit; and (4) did not incorporate Maybee’s version of events into a legal document to be signed under penalty of perjury.

## **CONCLUSION**

The Special Master’s investigation revealed that, not only did the former Assistant Secretary-Indian Affairs delete individual Indian trust records in derogation of a myriad of legal and trust principles but, when his actions came to light, he fabricated a story that blamed others for his misdeeds. Simply stated, McCaleb proved to be as complacent with the truth as he was with his fiduciary responsibilities.

McCaleb’s malfeasance, however, must be viewed in larger context. 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 affairs can best be described as chaotic.

---

<sup>49</sup> The Special Master finds it curious that McCaleb would not admit to conferring with Martin over the origin and substance of the Draft Affidavit yet return the document to her with hand-written changes affixed with his initials and the legend: “approved as amended.”

The Special Master recommends that the Court take additional action in accordance with the findings in this report.

Respectfully submitted,

---

Alan L. Balaran  
SPECIAL MASTER

DATE: \_\_\_\_\_