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## **7. INSIDE INTERIOR: Agency attorney faces dismissal over Indian trust disclosures** (09/27/2007)

**Arthur O'Donnell, *Land Letter* editor**

An Interior department attorney who gave non-public documents to a Southern California newspaper reporter to illustrate his allegations of mismanagement by agency employees, now faces possible termination for alleged violations of the Trade Secrets Act. The heart of the matter is Robert McCarthy's continuing campaign to reveal problems and failures in the administration of Indian trust duties by Bureau of Indian Affairs staff members in the Palm Springs office.

According to Interior documents, McCarthy claims that continuing BIA management problems are "costing the landowners because of delays on lease agreements, overdue payments, and the failure to properly assess annual rent increases."

In August, McCarthy, a field solicitor at Interior's Palm Springs Field Office was informed by Pacific Southwest regional solicitor Daniel Shillito that revealing certain documents – including a redacted draft copy of an internal agency investigation into commercial leasing activities by the BIA staff in Palm Springs – "was a deliberate and harmful act."

The documents and McCarthy's allegations were subsequently described in an April 10 article in the *Desert Sun* newspaper that caught the attention and ire of regional and national BIA officials.

Besides threatening McCarthy with dismissal, Shillito – citing the demands of the office of BIA's director in Washington – also told McCarthy he could no longer access his office or use the law library. "The director demanded that you be removed from office permanently because, based on your contributions to the article and other inappropriate examples of conduct leading up to the article's release, the bureau could no longer trust you as their attorney," Shillito wrote.

In addition, Shillito cited numerous alleged violations by McCarthy of the Trade Secrets Act, which he described as "harmful to the agency and likely to impair the competitive position of the person from whom the information was obtained."

Many of these documents, including the draft report, Shillito's Aug. 9 memo and McCarthy's response, have been made public by Public Employees for Environmental Responsibility (PEER), which is representing McCarthy.

McCarthy, who continues to perform limited legal duties from his home, was unavailable for comment. PEER executive director Jeff Ruch, however, told *Land Letter* that McCarthy has since 2005 been trying to bring to light problems in the management of thousands of leases and contracts related to the Aqua Caliente Band of Cahuilla Indians' lands and resources in Palm Springs and vicinity.

Though numbering just 425 members who collect on proceeds, the Aqua Caliente band takes in about \$30 million per year from leases on trust lands.

Among documents PEER has made available is a February 2007 letter from Interior's Inspector General Earl Devaney to California Sen. Barbara Boxer (D), essentially confirming that his office was conducting an investigation and had found at least some evidence that BIA staffers had accepted gifts from lease holders and contractors. It was also apparent that there was some foundation for McCarthy's allegations that the local office had not implemented recommendations from a previous IG management audit. "We confirmed that the BIA Palm Springs office has not implemented all of the OIG's audit recommendations, and officials conceded that problems remain within the lease program," Devaney wrote to Sen. Boxer. "They also expressed concerns that the Palm Springs office is understaffed and the automated lease system is insufficient."

PEER is pursuing a Freedom of Information Act request to obtain the IG's full investigatory report, Ruch said.

Also released by PEER was an executive summary of a recent report from the Office of Trust Review and Audit (OTRA) that the group says further confirms McCarthy's allegations. The report found that BIA "should improve its administration of commercial leases in the areas of lease payment tracking and distribution, lease collections, site inspections, and compliance

and operational effectiveness."

Though authorized for up to 31 employees in the 1990s, staffing for the office has dropped to 10 employees, with two vacant positions, the report said.

While all of these documents appear to back up the accuracy of McCarthy's whistleblowing activities, Ruch said, "Being right is beside the point. The Trade Secrets Act is being used to trump whistleblower protections." The agency is trying to make a case that whistleblowing is not protected when a crime has been committed, Ruch said.

McCarthy's formal response to the Shillito memo counters that the disclosures "fall outside of the coverage of the Trade Secrets Act because they did not identify individuals and conveyed no confidential information; do not impair the ability of the government to obtain similar information in the future; and did not cause substantial harm to the submitters' competitive positions."

## A protected witness

The case is even more complicated by the fact that McCarthy has now been named as a witness for plaintiffs in the continuing class-action lawsuit, *Cobell v. Kempthorne*, in which tribal members claim BIA and Interior have failed in their trust duties. In that regard, Ruch added, McCarthy ought to have additional protections against retaliation by his superiors for revealing evidence of agency mismanagement.

At this point, the dismissal case has landed in the lap of Richard Myers, regional solicitor in Alaska, after being referred to Interior solicitor David Bernhardt, who also served as lead attorney in the Cobell case.

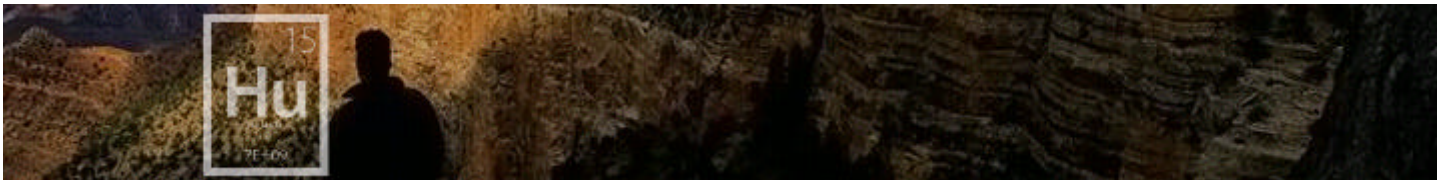
An Interior Department spokesman declined any comment on the case, saying it is a personnel matter. Sen. Boxer's office also had no comment.

The Cobell case is coming up for hearings Oct. 10 in the U.S. District Court in Washington, D.C., but may be delayed by procedural matters over access to records, Ruch indicated. Earlier this year, Interior offered to settle the case for a \$7 billion payment over 10 years, but plaintiffs allege their economic harm from mismanagement during the last 50 years falls somewhere between \$13 billion and \$50 billion.

[Click here](#) to access PEER's compilation of documents in the McCarthy case.

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