UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 1:96CV01285
	)	(Judge Lamberth)
GALE A. NORTON, Secretary of the Interior, et al.,	)	
	)	
	)	
Defendants.	)	
	)	

DEFENDANTS' REPLY MEMORANDUM IN FURTHER SUPPORT OF THEIR MOTION TO STAY THE COURT'S STRUCTURAL INJUNCTION PENDING APPEAL

Defendants respectfully submit this reply memorandum in further support of their motion to stay the Order Issuing Structural Injunction entered by the Court on September 25, 2003 ("Structural Injunction Order"). After this motion was filed, the Court of Appeals administratively stayed the Structural Injunction Order until it decides whether to order a stay pending appeal. The administrative stay, while in effect, precludes this Court from issuing its own stay ruling. In the event that the stay imposed by the Court of Appeals is lifted, this Court should grant Defendants' stay motion so that, before vast amounts of public funds are consumed, the Court of Appeals may resolve the substantive legal issues arising from the obligations imposed by the Structural Injunction Order and from the recent controlling legislation passed by Congress and signed by the President.

PRELIMINARY STATEMENT

This litigation has, in every way, become unmoored from its origin as a suit to compel an accounting that had been unreasonably delayed. In its initial decision, the Court of Appeals affirmed what it thought to be relatively modest relief, requiring that the Department of the Interior ("Interior") perform an accounting consistent with its decision, but affording Interior appropriate discretion to fashion the means for conducting that accounting. Plaintiffs point to no evidence of further unreasonable delay since the initial appellate decision. As the Court of Appeals recognized in vacating this Court's contempt findings against the Secretary, the evidence has demonstrated the Secretary's commitment to the performance of a historical accounting. The Phase 1.5 trial that preceded the issuance of the structural injunction produced no evidence of delay, and Plaintiffs cite none. To the contrary, building on its prior accomplishments, Interior presented a plan to perform a historical accounting within five years at a cost of $335 million (an amount nearly as great as the funds in the accounts at issue).

Notwithstanding the foregoing, the Court has issued an injunction that marks an unprecedented judicial takeover of executive branch functions. Congress, in the wake of this Court's injunction ruling, observed that it had previously "stated in no uncertain terms that it would not appropriate billions of dollars for a historical accounting." H.R. Conf. Rep. No. 108-330, at 117 (2003). Congress stressed that it would be "devastating to Indian country" to divert billions of dollars in the manner required by the Court's injunction. Id. Believing that urgent action was required, Congress amended the law to provide that nothing in substantive law shall "be construed or applied to require the Department of the Interior to commence or continue

historical accounting activities," for a one-year period or until Congress acts, with respect to Individual Indian Money accounts, and indicated that it would consider additional legislation in the course of the coming year. Department of the Interior and Related Agencies Appropriations Act, 2004, Pub. L. No. 108-108.

In their opposition brief,[1] Plaintiffs fail to address the numerous substantive infirmities inherent in the Structural Injunction Order. Nor do they suggest that requiring Interior to comply with the injunction would be consistent either with the terms of the new legislation relative to the accounting issue, see Pub. L. 108-108, or with Congress's assessment of the public interest generally and the interest of individual accountholders in particular. Instead, Plaintiffs argue that this Court should issue its own ruling denying a stay, in spite of the stay imposed by the Court of Appeals. In support of this remarkable contention, Plaintiffs assert that the new law is unconstitutional, and that Defendants have failed to establish the prerequisites for a stay. As we show below, these contentions are baseless.

ARGUMENT

Shortly after this motion was filed, the Court of Appeals issued an order "that the district court's order issuing structural injunction filed September 25, 2003, be stayed pending further order of the court." Cobell v. Norton, No. 03-5314, 2003 WL 22711642 (D.C. Cir. Nov. 12, 2003).[2] In brazen defiance of this Order, Plaintiffs filed two motions asking this Court to issue

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[1] Plaintiffs' Opposition To Defendants' Motion To Stay The Court's Structural Injunction Pending Appeal (Nov. 24, 2003).

[2] The appellate court's order was issued in response to Appellants' Motion For Stay Pending Appeal (Nov. 10, 2003).

its own stay ruling,[3] and again assert here that the Court may rule on a stay motion that is presently the subject of a binding appellate order. See Plaintiffs' Opposition To Defendants' Motion To Stay The Court's Structural Injunction Pending Appeal (Nov. 24, 2003) ("Plaintiffs' Opposition Brief") at 14-16. No authority has been put forward for this inherently untenable position, and none exists.[4] This Court is simply without power to do what Plaintiffs request, *i.e.,* issue an order denying a stay while a stay has already been imposed by the Court of Appeals.[5]

In the event that the appellate administrative stay is lifted, a stay should issue from this Court to allow the Court of Appeals an opportunity to resolve the significant legal questions raised by the Structural Injunction Order. As set forth in Defendants' moving papers, these

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[3] One day after the Court of Appeals stayed the Structural Injunction Order, Plaintiffs filed a "Motion For Expedited Consideration Of Defendants' Motion To Stay The Court's Structural Injunction Pending Appeal" (Nov. 13, 2003). Several days later, Plaintiffs filed a motion styled "Plaintiffs' Consolidated Motion To Construe Defendants' Motion To Stay The Court's Structural Injunction As Motion To Amend Timetables In The Structural Injunction And Request For Declaration That The Interior Defendants Violated The Structural Injunction Prior To November 10, 2003" (Nov. 17, 2003). Although contradictory in the positions asserted, the objective of both motions is to procure a stay ruling from this Court despite the fact that a stay already has been imposed by the Court of Appeals. See Defendants' Opposition To (1) Plaintiffs' Motion For Expedited Consideration Of Defendants' Motion To Stay The Court's Structural Injunction Pending Appeal; and (2) Plaintiffs' Consolidated Motion To Construe Defendants' Motion To Stay The Court's Structural Injunction As Motion To Amend Timetables In The Structural Injunction And Request For Declaration (Nov. 26, 2003).

[4] Indeed, although stubbornly continuing to assert in their opposition brief that this Court may issue a stay ruling while the stay imposed by the Court of Appeals is in effect, Plaintiffs reveal (albeit in a footnote) their apparent comprehension that this position is specious: "In part to clarify this Court's authority to consider the stay request in the first instance, plaintiffs have moved to vacate the administrative stay." Plaintiffs' Opposition Brief at 14 n.6.

[5] Insofar as Plaintiffs argue that the Court of Appeals may not issue a stay on the merits without awaiting a decision from this Court, see Plaintiffs' Opposition Brief at 14-17, that is an appellate issue that has been briefed in the proceedings before the Court of Appeals.

include, inter alia, whether the Court had any authority to impose the obligations contained therein in the first instance, and the impact of the subsequent change in law on those obligations. See Defendants' Motion To Stay The Court's Structural Injunction Pending Appeal (Nov. 10, 2003). Neither Plaintiffs' constitutional challenge nor their conclusory argument that Defendants have not met the prerequisites for a stay succeeds in refuting the plain need for a stay.

I. Plaintiffs' Constitutional Challenge To Public Law No. 108-108 Is Without Merit

Plaintiffs assert that a stay is inappropriate because Public Law No. 108-108 is unconstitutional.[6] As our stay motion made plain, issuance of a stay would have been warranted even if Congress had taken no action. Even if it were assumed that Plaintiffs' constitutional objections had merit, the structural injunction would be fundamentally unsound and would require an immediate shifting of priorities to deal with requirements that should never have been imposed.

In any event, Plaintiffs' constitutional challenge is baseless. It is established that Congress may amend the substantive law that provided the basis for an ongoing injunction. See, e.g., Miller v. French, 530 U.S. 327, 344 (2000); Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 232

[6] Plaintiffs colorfully refer to the legislation as the "Midnight Rider" provision and suggest that the measure is somehow suspect because it was introduced by the Conference Committee. They neglect to mention that the House and Senate submitted their versions of the Interior appropriations bill before this Court issued its structural injunction on September 25, 2003. See 149 Cong. Rec. S12004 (Senate version passed on September 23, 2003); 149 Cong. Rec. H7104-05 (House version passed on July 17, 2003). After the Conference Committee introduced the amendment on October 27, 2003, the House debated the measure for three days, see 149 Cong. Rec. H9970-71, H9992-95, H10197-203, and ultimately approved it on October 30. Id. at H10205. The Senate followed suit on November 3. 149 Cong. Rec. S13785-90.

(1995); Robertson v. Seattle Audubon Soc'y, 503 U.S. 429, 432-35, 441 (1992). An injunction that no longer has a basis in law must be vacated. See Miller, 530 U.S. at 347.

Plaintiffs nonetheless claim two constitutional defects in the new legislation. Relying on Plaut, Plaintiffs first contend that the new legislation offends separation of powers principles by overriding this Court's 1999 declaratory judgment ruling, as affirmed by the Court of Appeals in 2001. But Plaintiffs' reliance on Plaut is misplaced for two independent reasons: The 1999 declaratory judgment was an interlocutory ruling, not a final judgment; and it awarded prospective relief, not damages. As the Court of Appeals has explained, Plaut, "while holding that Congress may not legislate to require federal courts to *reopen* suits for money damages after final judgment, . . . distinguished between pending cases and final judgments, saying that '[w]hen a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly.'" National Coalition To Save Our Mall v. Norton, 269 F.3d 1092, 1096 (D.C. Cir. 2001), cert. denied, 537 U.S. 813 (2002) (quoting Plaut, 514 U.S. at 226); see Plaut, 514 U.S. at 227 ("It is the obligation of the last court in the hierarchy that rules on the case to give effect to Congress's latest enactment, even when that has the effect of overturning the judgment of an inferior court, since each court, at every level, must decide according to existing laws.") (internal quotation marks omitted).

Plaintiffs do not contend that the structural injunction that is directly at issue in the pending appeal is a final judgment. Instead, they assert that the declaratory judgment issued in 1999 and affirmed in 2001 was final. This contention is difficult to fathom. This Court did not regard its

1999 ruling as a final judgment. To the contrary, it certified that ruling for interlocutory review pursuant to 28 U.S.C. § 1292(b). Cobell v. Babbitt, 91 F. Supp. 2d 1, 57 (D.D.C. 1999). Nor did this Court enter final judgment on remand. To the contrary, the injunction now on review arises in the same case on the basis of the same complaint.

In any event, as the Court of Appeals explained in National Mall, the Plaut rule against reopening final judgments applies only to damages awards, not to awards of prospective relief. "[A]lthough an injunction may be a final judgment for purposes of appeal, it is not the 'last word of the judicial department' because any provision of prospective relief 'is subject to the continuing supervisory jurisdiction of the court, and therefore may be altered according to subsequent changes in the law.'" National Mall, 269 F.3d at 1096-97 (quoting Miller, 530 U.S. at 347). Thus, as the Supreme Court stressed in Miller, "Plaut . . . was careful to distinguish the situation before the Court in that case – legislation that attempted to reopen the dismissal of a suit seeking money damages – from legislation that 'altered the prospective effect of injunctions entered by Article III courts.'" 530 U.S. at 344 (quoting Plaut, 514 U.S. at 232). Plaut "emphasized that 'nothing in our holding today calls . . . into question' Congress' authority to alter the prospective effect of previously entered injunctions. Prospective relief under a continuing, executory decree remains subject to alteration due to changes in the underlying law." Id. (citation omitted). The 1999 declaratory judgment awarded prospective relief, not damages. Thus, even if the ruling could be regarded as a final judgment, it would remain subject to changes in governing law.

Plaintiffs alternatively contend that the new legislation violates the separation of powers because, in their view, it does not alter substantive law but instructs the courts on how to apply

existing law. Plaintiffs thus claim that the new legislation offends the principle announced in United States v. Klein, 80 U.S. 128 (1871), that the legislature cannot "prescribe rules of decision to the Judicial Department of the government in cases pending before it[.]" Id. at 146.

The Supreme Court has made clear that "[w]hatever the precise scope of Klein . . . its prohibition does not take hold when Congress 'amend[s] applicable law.'" Plaut, 514 U.S. at 218 (quoting Robertson, 503 U.S. at 441). That principle holds even if the new law is intended to resolve a particular pending dispute. Thus, in Robertson, the Supreme Court rejected a separation of powers challenge to the Northwest Timber Compromise, an appropriations measure that expired by its terms at the end of the fiscal year, and that was enacted to resolve two pending lawsuits in which injunctions had already been entered. See Robertson, 503 U.S. at 432-33. Although the measure provided that Congress "determines and directs that" the actions already taken by the government constituted "adequate consideration for the purpose of meeting the statutory requirements that are the basis for the consolidated cases" identified by caption in the legislation, id. at 434-35, the Supreme Court rejected the contention that it offended the separation of powers. See id. at 439-41; see also National Mall, 269 F.3d at 1097 (discussing Robertson).

Notwithstanding Robertson, Plaintiffs insist that the new legislation cannot be viewed as an amendment to existing law because it provides that nothing in the otherwise governing law "shall be construed or applied" to require Interior to commence or continue historical accounting activities. As the Fifth Circuit explained in rejecting the identical argument, "numerous statutory schemes use the language 'shall be construed' to describe the limitations and boundaries of a

congressional delegation of authority." First Gibraltar Bank, FSB v. Morales, 42 F.3d 895, 900 (5th Cir. 1995). Congress could have included the language of the new legislation in the 1994 Act itself, providing that the statute should not be "construed or applied" to authorize judicially imposed accounting requirements. Plainly, no constitutional questions would have been raised. That the language is contained in subsequent legislation does not alter the analysis. Just as Congress may include the phrase in its initial legislation to establish the substantive boundaries of a statute, it likewise may use the phrase in an amendment to establish such boundaries. See id. at 900 (rejecting the plaintiff's contention that the phrase "shall be construed" indicated that the statutory amendment directed the judiciary to interpret the law in a particular way, and concluding that the measure instead "represent[ed] a change in the underlying law").

II. Defendants Have Demonstrated That All Factors Weigh Heavily In Favor Of A Stay

Plaintiffs assert that the structural injunction is consistent with the Court of Appeals' decision in Cobell v. Norton, 240 F.3d 1081 (D.C. Cir. 2001), and that the balance of harms and the public interest militate against granting of a stay. These contentions have no bases.

A. Likelihood of Success on the Merits.

As we showed in our motion, Defendants would be entitled to a stay even if Congress had not enacted new legislation. As we discussed, the Court of Appeals in its initial decision concluded that Interior had unreasonably delayed in performing an accounting and affirmed a remand to the agency to allow it to undertake that accounting. Emphasizing that the actionable duty at issue was the performance of an accounting and not subsidiary duties, the Court of

Appeals required this Court to amend its order and admonished it to be mindful of the limits on its jurisdiction. Id. at 1106, 1110.

Plaintiffs do not dispute that this Court failed to modify its ruling as required by the Court of Appeals, and they do not explain how this Court's action conforms to the Court of Appeals' instructions. Contrary to Plaintiffs' suggestion, the Court of Appeals' reference to common law trust principles as well as the language of the 1994 Act in no way alters the duty defined by the appellate court or its admonitions regarding this Court's jurisdiction. In any case, this Court had dismissed Plaintiffs' common-law claims prior to the Court of Appeals' initial decision, see 91 F. Supp.2d at 27-31, and the appellate ruling did not depend on its discussion of common law. See 240 F.3d at 1102, 1105-06.

The Court of Appeals affirmed what it understood be "relatively modest" relief. Id. at 1109. But this Court has now issued a "structural injunction" that, to our knowledge, is without precedent in judicial review of executive branch action. Plaintiffs make no attempt to show how intervening events could be thought to justify this result. They point to no evidence of unreasonable delay in the recent Phase 1.5 trial. Nor do they explain how this Court could properly justify its takeover of Interior operations on the basis of the contempt ruling that was reversed by the Court of Appeals. See Cobell v. Norton, 334 F.3d 1128, 1150 (D.C. Cir. 2003).

As we noted, this Administration is committed to the performance of an accounting and, as the Court of Appeals has recognized, its efforts have resulted in considerable progress. See

id. at 1148. The Interior Accounting Plan, which would have cost $335 million, would, at a minimum, have fully comported with the Court of Appeals' understanding of the duties at issue.

Unfortunately, this case has effectively ceased to be a suit about unreasonable delay in the performance of an accounting. Interior has accomplished much and has set out clear plans for completing an accounting. These plans may be affected by further legislation in this area. But whether or not Congress enacts additional legislation, it should be plain that Interior has not engaged in unreasonable delay since this Court's initial decision and that it is not engaging in unreasonable delay at this time. This Court's decision to exercise pervasive control over Interior's trust administration activities through the Structural Injunction Order is without basis in law or fact. And, just as clearly, there is no further basis for this Court's continuing jurisdiction. An agency does not, by once engaging in unreasonable delay, subject itself to intrusive oversight long after it has dedicated its resources to performing the duties at issue. Final agency action is subject to judicial review. But this suit cannot be used as a vehicle to exert wholesale control over agency operations.

B. Balance of Harms and the Public Interest.

Plaintiffs' assessment of these factors is sharply at odds with that of Congress, which correctly concluded that the structural injunction "would require that vast amounts of funds be diverted away from other high-priority programs, including Indian programs." H.R. Conf. Rep. No. 108-330, at 117. The committee stressed that this "would be devastating to Indian country and to the other programs in the Interior bill." Id. As the committee explained, the expenditure of billions of dollars on an accounting "would not provide a single dollar to the plaintiffs[.]" Id.

Plaintiffs make no attempt no show why the congressional judgment is wrong in any respect. It is the case, of course, that the full impact of the injunction would not be felt at once. But, on their face, the plethora of detailed requirements that come due between now and March 31, 2004 leave no doubt that Interior's resources would be consumed with making progress toward unsound goals that have been rejected by Congress and would result in little, if any, benefit to accountholders. Interior cannot simultaneously direct its efforts to the performance of a court-ordered plan and also direct those same resources to the activities that Congress has directed should be the immediate focus of its efforts, such as accounting for per capita and judgment accounts. See Pub. L. No. 108-108; Declaration of James E. Cason, executed Nov. 10, 2003 ("Cason Decl."), at 12-13. Nor do Plaintiffs dispute that, absent a stay, Interior may be subject to the appointment of a new Judicial Monitor and other agents with "unlimited access" to government facilities and extraordinary and entirely improper powers "to conduct confidential interviews" with government personnel. Cobell v. Norton, 283 F. Supp. 2d 66, 294.

Similarly, Plaintiffs do not explain how Congress erred in believing that the injunction "would not provide a single dollar to the plaintiffs[.]" H. R. Conf. Rep. No. 108-330 at 117. Congress was not insensitive to the financial conditions of many accountholders. It recognized, however, that the diversion of billions of dollars would not improve those conditions and would adversely affect the Native American population.[7]

[7] Moreover, as significant as the income from IIM accounts may be collectively, about 96% of the 193,800 land-based accounts receive less than $250 per year, a consequence of the repeated divisions of land interests. Cason Decl. at 2.

In sum, the congressional assessment of the consequences of the injunction are correct and thus warrant issuance of a stay.

CONCLUSION

For all of the foregoing reasons, Defendants request that, in the event the Court of Appeals lifts the administrative stay of the Structural Injunction Order it imposed on November 12, 2003, this Court issue a stay pending resolution of the appeal of the Structural Injunction Order.

Dated: December 5, 2003

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on December 5, 2003 the foregoing *Defendants' Reply Memorandum in Further Support of Their Motion to Stay the Court's Structural Injunction Pending Appeal* was served by Electronic Case Filing, and on the following who is not registered for Electronic Case Filing, by facsimile:

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