~~UNITED STATES COURT OF APPEALS~~
FOR DISTRICT OF COLUMBIA CIRCUIT
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No. 05-5068

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ELOUISE PEPION COBELL, et al.,

Plaintiffs-Appellees,

v.

GALE A. NORTON, SECRETARY OF THE INTERIOR, et al.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

APPELLANTS' EMERGENCY MOTION FOR STAY PENDING APPEAL AND EXPEDITION

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ELOUISE PEPION COBELL, et al., Plaintiffs-Appellees, v. GALE A. NORTON, Secretary of the Interior, et al., Defendants-Appellants.	No. 05-5068 [Civil Action No. 96-1285 (D.D.C.)]

EMERGENCY MOTION FOR STAY PENDING APPEAL AND EXPEDITION

INTRODUCTION AND SUMMARY

Defendants-appellants the Secretary of the Interior, et al., respectfully ask this Court to stay the "Structural Injunction" entered by the district court on February 23, 2005, pending disposition of this appeal. In that ruling, the district court reissued, without modification, the "historical accounting" portion of the Structural Injunction vacated by this Court on December 10, 2004. Cobell v. Norton, 392 F.3d 461 (D.C. Cir. 2004). The order declares that the district court "will not grant a stay pending appeal" of the injunction. Mem. Op. 14. The injunction establishes an elaborate series of deadlines, commencing 60 days from the issuance of the order, that direct in minute detail accounting activities costing many billions of dollars. Absent a stay, Interior will be required to redeploy its resources in an attempt to comply with requirements having no basis in law. We thus ask for a stay pending appeal, and, if necessary, for a temporary stay to permit the Court to consider the stay application. We also ask that the Court establish an expedited briefing schedule to permit early resolution of this controversy.[1]

The district court's order is remarkable in all respects. Plaintiffs did not seek reinstatement of the injunction, which issued sua sponte and without prior notice to the parties. The injunction that

[1]Pursuant to Local Rule 8, plaintiffs' counsel has been given advance notice, by telephone, of the filing of this motion.

has now reissued formed part of a still broader structural injunction issued in September 2003, which also included an array of provisions directing virtually every aspect of Indian trust management grouped under the heading of "Fixing the System." In that injunction, the district court rejected the Department of the Interior's plan for completing historical accounting activities within five years. In its place, the court imposed requirements that transformed the accounting's parameters and dictated the minutiae of its performance at a cost then estimated at between $6 billion and $12 billion.

Congress responded to the 2003 injunction by amending governing law in the FY 2004 Interior appropriations statute, Pub. L. No. 108-108, so as to stay operation of the accounting portion of the injunction until expiration of the legislation on December 31, 2004. This Court granted a stay pending appeal of the entire injunction.

On December 10, 2004, this Court vacated all aspects of the injunction, except for a single filing requirement contained in the "Fixing the System" part of the injunction. In light of the legislation governing the accounting portion of the injunction, the Court did not rule on the government's argument that the injunction was fatally flawed even without regard to the appropriations legislation. However, the Court offered guidance plainly pertinent to the accounting injunction.

The Court explained that Congress had passed Pub. L. No. 108-108 in response to the district court's injunction "to clarify Congress's determination that Interior should not be obliged to perform the kind of historical accounting the district court required." 392 F.3d at 466. The Court cited the conference committee's statement that "'[i]nitial estimates indicate that the accounting ordered by the Court would cost between $6 billion and $12 billion,'" and the committee's rejection of "'the notion that in passing the American Indian Trust Fund Management Reform Act of 1994 Congress had any intention of ordering an accounting on the scale of that which has now been ordered by the Court.'" Ibid. (quoting H.R. Conf. Rep. 108-330, at 118).

The Court also identified fundamental legal errors underlying the "Fixing the System" aspects of the structural injunction that had also formed the basis for the historical accounting provisions. The premise of the accounting injunction is that the district court's authority extends far beyond the power to review agency action for compliance with law. As this Court noted, the district court believed that

it could go further and "formulate a plan of its own that will satisfy the defendant's liability.'" 392 F.3d at 475 (quoting 283 F. Supp. 2d at 142) (addressing accounting provisions). The Court explained, however, that while the district court is empowered to "compel an agency . . . to take action upon a matter," it is not empowered to "direct[] how it shall act.'" Ibid. (quoting Norton v. Southern Utah Wilderness Alliance, 124 S. Ct. 2373, 2379 (2004)). The Court thus rejected the "[t]he prospect of pervasive oversight by federal courts over the manner and pace of agency compliance with such [broad] congressional directives . . ." Id. at 472 (quoting Southern Utah, 124 S. Ct. at 2381). Moreover, as the Court explained, even private trustees, though "held to high fiduciary standards, are generally free of direct judicial control over their methods of implementing these duties, and trustee choices of methods are reviewable only 'to prevent an abuse by the trustee of his discretion.'" Id. at 473 (quoting Restatement (Second) of Trusts §§ 186-87 (1959)).

The district court's reinstatement of the accounting injunction accords essentially no consequence to the intervening actions of Congress and this Court. The district court dismissed Congress's action as "a bizarre and futile attempt at legislating a settlement of this case, " Mem. Op. 14, and concluded that, with the expiration of Public Law 108-108, the remainder of this Court's opinion was "not relevant for the present purpose." Id. at 2. Because the provisions of the historical accounting portion of the structural injunction "were never addressed specifically on the merits," there was, in the district court's view, "no ruling from the Court of Appeals obstructing this Court's authority, sitting as a Court of Equity, to issue injunctive relief of the kind set forth in the 'historical accounting' portion of the September 2003 Structural Injunction." Id. at 4.

A stay pending appeal is plainly warranted. The district court has reissued without modification injunctive provisions requiring the expenditure of billions of dollars to account for funds currently totaling approximately $400 million. In so doing, the court did not address Congress's concern that this expenditure of billions of dollars would not provide a single dollar to the plaintiff class, and did not explain how a mandate to begin such a task would do anything other than to delay, yet again, the type of accounting contemplated by Congress.

As set forth below, all of the deadlines imposed by the injunction are keyed to the district

court's ultimate vision of an accounting, and would result in a wholesale diversion of the limited resources appropriated by Congress away from the accounting activities now being pursued by Interior, in favor of expenditures that will not bear fruit and are beyond the scope of the district court's authority. Any attempt to comply with even the most distant of the district court's deadlines would require that diversion to begin immediately. We thus ask that this Court issue a stay pending appeal, and, if necessary, a temporary stay while it considers the stay application.

STATEMENT

A. Background.

Interior holds approximately $400 million in trust for the benefit of individual Indians. As of December 31, 2000, these funds were maintained in approximately 260,000 separate Individual Indian Money accounts.

In 1994, Congress enacted the American Indian Trust Fund Management Reform Act, Pub. L. No. 103-412, 108 Stat. 4239 ("1994 Act"). Section 102(a) provides that "[t]he Secretary shall account for the daily and annual balance of all funds held in trust by the United States for the benefit of an Indian tribe or an individual Indian which are deposited or invested pursuant to the Act of June 24, 1938 (25 U.S.C. § 162a)." 1994 Act, § 102, 25 U.S.C. § 4011(a).

Plaintiffs brought this class action in 1996. In 1999, the district court issued a declaratory judgment holding that the 1994 Act "requires defendants to provide plaintiffs an accurate accounting of all money in the IIM trust held in trust for the benefit of plaintiffs, without regard to when the funds were deposited." Cobell v. Norton, 91 F. Supp. 2d 1, 58 (D.D.C. 1999). Because the agency had not yet provided such an accounting, the district court remanded the matter to allow Interior to come into compliance. The district court retained jurisdiction for five years, and required Interior to file quarterly reports explaining the steps taken to rectify the breaches found. Id. at 59.

On interlocutory review, this Court largely affirmed, rejecting the government's contention that Congress had committed to the agency's discretion decisions regarding the extent to which to review transactions that pre-dated the 1994 Act. Cobell v. Norton, 240 F.3d 1081, 1102 (D.C. Cir. 2001). The Court "ruled that the 1994 Act, 25 U.S.C. § 4011(a), conferred a right on IIM beneficiaries to 'a

complete historical accounting of trust fund assets,' explaining that '"all funds" [as used in that provision] means all funds, irrespective of when they were deposited (or at least so long as they were deposited after the Act of June 24, 1938).'" Cobell v. Norton, 392 F.3d at 465.

B. The Structural Injunction.

1. The 2002 Contempt Ruling.

The structural injunction was the outgrowth of contempt proceedings culminating in a 2002 decision holding the Secretary of the Interior and an Assistant Secretary in contempt on the basis of Interior's purported failure to initiate an historical accounting and on claimed inaccuracies in Interior's quarterly reports. Cobell v. Norton, 226 F. Supp. 2d 1 (D.D.C. 2002). The district court declared that "Secretary Norton and Assistant Secretary McCaleb can now rightfully take their place * * * in the pantheon of unfit trustee-delegates." Id. at 161. Based on its contempt findings, the district court announced that it, rather than the agency, would direct the conduct of accounting and other trust activities. The district court thus ordered the government to submit a plan for an accounting as well as a plan for achieving compliance with the government's fiduciary obligations to Indians, to be evaluated by the court with a view to issuance of structural relief. Id. at 148-49.

In July 2003, this Court vacated the contempt ruling. The Court concluded that the contempt order did not fall within the civil contempt authority. Thus, the only relevant findings to emerge from the trial were those relevant to the conduct of the officials currently charged with responsibility for Indian trust funds management – Secretary Norton and, at that time, Assistant Secretary McCaleb. The Court held that the record demonstrated that "in her first six months in office Secretary Norton took significant steps toward completing an accounting." Cobell v. Norton, 334 F.3d 1128, 1148 (D.C. Cir. 2003). The Court described the district court's reasoning with respect to the remaining contempt charges as "mystifying," id. at 1149, and "inconceivable," id. at 1150.

Meanwhile, in January 2003, Interior filed its accounting plan pursuant to the district court's directive. The Historical Accounting Plan for Individual Indian Money Accounts set out a plan to complete an accounting within five years, subject to congressional appropriations. At the time, the estimated cost of implementing the plan was $335 million.

2. The 2003 Structural Injunction.

The district court conducted a 44-day trial beginning in May 2003. As contemplated by the district court's contempt decision, the trial did not determine whether to enter an injunction but, instead, determined the content of the injunction. Plaintiffs attempted to show that an historical accounting was impossible and that the district court should adopt a model that would, in plaintiffs' view, reflect the revenue generated by their trust assets over more than a century. The government urged that the work it had already performed demonstrated that it could accomplish the historical accounting outlined in the Accounting Plan, subject to available appropriations.

As explained above, in July 2003, this Court vacated the contempt ruling that formed the predicate for the district court's assumption of authority. Nonetheless, the district court found no need to revisit its decision to issue structural relief. In September 2003, the district court issued a sweeping "structural injunction" encompassing both the performance of an accounting and the implementation of a broad program of trust reform. Cobell v. Norton, 283 F. Supp. 2d 66 (D.D.C. 2003). The district court announced that it would treat its previous contempt findings as "established" because, in the district court's view, they retained their vitality even though the contempt ruling had been vacated by this Court. Id. at 85. Echoing the contempt ruling, the district court explained that it was issuing a structural injunction, rather than remanding to the agency, because it did not trust the Secretary or her subordinates to carry out their official duties. Id. at 225. Although the accounting portion of the injunction purported to adopt a modified version of Interior's historical accounting plan, its requirements bore no meaningful resemblance to the Interior Plan. Under the Interior plan, Interior would have provided each holder of an IIM account open as of October 25, 1994 or thereafter, with an accounting of all transactions in the account since 1938. Interior would produce, based on Interior's paper and electronic bookkeeping records, a ledger for each open IIM account that describes all of the post-1938 transactions in each account. The account statement would be based on an actual compilation of transactions pertaining to the account without the use of statistical sampling. See Accounting Plan at III-5.

The Accounting Plan also included an audit process for verifying the accuracy of an individual

account statement. Whereas sampling would not be used to generate the account statements, sampling would be used to verify the reliability of the underlying records used to prepare the statement. The use of sampling was crucial to the viability of the Plan, and reflected the fact that the vast majority of transactions involved relatively small sums of money. See Cason Decl. at 4.

In contrast, the court's injunction radically expanded the parameters of the accounting and dictated its methodology. Its provisions – now reinstated – require that Interior:

- Produce account statements for all accounts that have ever been in existence, regardless of whether the accounts were long closed, and regardless of whether the account holders were long deceased and their estates made the subject of a final probate order. Injunction, §§ III(E), (F); cf. 283 F. Supp. 2d at 169-75.
- Produce account statements that describe every account transaction since 1887. Injunction, § III(E); cf. 283 F. Supp. 2d at 172-73.
- Account for all transactions in land held in trust for individual Indians dating back to 1887. Injunction, §§ III(G), (M); cf. 283 F. Supp. 2d at 175-77.
- Account for monies that were never held in trust at all, but were paid directly to Indians by third parties. Injunction, § III(H); cf. 283 F. Supp. 2d at 177-80.
- Verify every transaction covered by the injunction, regardless of size and date, without use of statistical sampling. Injunction, §§ III(K), (L); cf. 283 F. Supp. 2d at 194-98.

Although the injunction purports to allow Interior to use sampling to perform an audit function, this statement is without practical significance because the injunction requires the government to verify individually each transaction encompassed by the injunction. Injunction, §§ III(K), (L); see 283 F. Supp. 2d at 194-98 (2003 opinion); 283 F. Supp. 2d at 288 (2003 injunction). In effect, therefore, the injunction makes the auditing or verification process part of the accounting itself, rendering the auditing (and sampling) envisioned by Interior entirely superfluous. See 392 F.3d at 465 (explaining that the district court had rejected any use of statistical sampling) (citing 283 F. Supp. 2d at 288-90). In addition, the injunction asserts jurisdiction over the manner in which Interior identifies and retrieves missing trust records, including the issuance of subpoenas to third parties, see Injunction, § III(B); the manner in which Interior collects and indexes trust records, see id., § III(C); the mechanics of various system tests and quality control measures discussed in the Interior Accounting Plan, see id., §§ III(N), (O); and the "industry production databases" and related computer software

that Interior may decide to use in connection with the accounting and audit, see id., § III(P).

The government appealed from the 2003 injunction and sought a stay pending appeal. Congress responded to the injunction with legislation enacted as part of the FY 2004 Interior appropriation, Pub. L. No. 108-108. The statute amended substantive law until December 31, 2004, to provide that neither the 1994 Act nor any provision of common law required the performance of an historical accounting.[2] This Court stayed all aspects of the injunction pending appeal.

3. This Court's December 10, 2004 Decision.

On December 10, 2004, this Court vacated the structural injunction except insofar as it requires the filing of Interior's "To Be" Plan.

The Court concluded that the passage of Pub. L. No. 108-108 had deprived the historical accounting portion of the injunction of any legal basis. The Court explained that "[t]he provision's legislative history makes clear that Congress passed it in response to [the district court's structural injunction] to clarify Congress's determination that Interior should not be obliged to perform the kind of historical accounting the district court required." Cobell v. Norton, 392 F.3d at 466. The Court cited the conference committee's rejection of "'the notion that in passing the American Indian Trust Management Reform Act of 1994 Congress had any intention of ordering an accounting on the scale of that which has now been ordered by the Court.'" Ibid. (quoting H.R. Conf. Rep. 108-330, at 118). The Court noted that, in addition, "individual legislators said in effect that the disparity between the costs of the judicially ordered accounting, and the value of the funds to be accounted for, rendered the ordered accounting, as one senator put it, 'nuts.'" Ibid. (quoting 149 Cong. Rec. at S13,786 (2003) (statement of Sen. Dorgan)).

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[2] That enactment provided that "nothing in the American Indian Trust Management Reform Act of 1994, Public Law 103-412, or in any other statute, and no principle of common law, shall be construed or applied to require the Department of the Interior to commence or continue historical accounting activities with respect to the Individual Indian Money Trust until the earlier of the following shall have occurred: (a) Congress shall have amended the American Indian Trust Management Reform Act of 1994 to delineate the specific historical accounting obligations of the Department of the Interior with respect to the Individual Indian Money Trust; or (b) December 31, 2004."

The Court recognized that absent Congressional action by December 31, 2004, Pub. L. No. 108-108 would "cease to bar the historical accounting provisions of the injunction." 392 F.3d at 468. The Court stated: "We do not address the issues that would be relevant if the district court then reissued those provisions." Ibid. The Court then vacated the remainder of the district court's ruling (with the exception of one filing requirement contained in the "Fixing the System" portion of the injunction, the requirement that the government submit its "To Be" plan). In so doing, the Court addressed the manner in which common law trust duties may inform statutory duties and made clear that general limitations on judicial review of agency action apply in this litigation.

After noting district court's "litigation innovation" of "requiring defendants to explain how they will cure a long list of defaults as to which the court has made no evidence-based finding," this Court observed that the district court had "abstracted the common law duties from any statutory basis." 392 F.3d at 471. The Court explained that common law trust duties could not be incorporated into federal law in this manner. Instead, "once a statutory obligation is identified, the court may look to common law trust principles to particularize that obligation." Id. at 472.

This Court also made clear that the fiduciary nature of the duties at issue did not vitiate the normal structure of judicial review of agency action. Citing the Supreme Court's recent decision in Norton v. Southern Utah Wilderness Alliance, the Court noted that the purpose of "[t]he APA's requirement of 'discrete agency action,' * * * was 'to protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve.'" 392 F.3d at 472 (quoting Southern Utah, 124 S. Ct. at 2381). The Court explained:

> If courts were empowered to enter general orders compelling compliance with broad statutory mandates, they would necessarily be empowered, as well, to determine whether compliance was achieved--which would mean that it would ultimately become the task of the supervising court, rather than the agency, to work out compliance with the broad statutory mandate, injecting the judge into day-to-day agency management .... The prospect of pervasive oversight by federal courts over the manner and pace of agency compliance with such [broad] congressional directives is not contemplated by the APA.

Ibid. (quoting Southern Utah, 124 S. Ct. at 2381).

The Court noted two additional factors at odds with the view that more expansive judicial

oversight was permissible because of proposed analogies to the duties of private trustees. The Court observed that "while the expenditures that plaintiffs seek are to be made out of appropriated funds, trust expenses for private trusts are normally met out of the trust funds themselves," so that "plaintiffs here are free of private beneficiaries' incentive not to urge judicial compulsion of wasteful expenditures." 392 F.3d at 473. The Court further noted that courts do not micromanage the methods by which private trustees implement their duties, and step in only to prevent an abuse of discretion. Ibid.

Applying these principles, this Court stressed that it is not the role of a court to assume control over the conduct of an agency's duties if it determines that its plans fail to comply with those legal duties. The Court noted that the district court (in the accounting portion of its opinion) had "used language suggesting an intent to take complete charge of the details of whatever plan Interior might submit: 'If the court [concludes that the plan will not satisfy defendants' legal obligation], it may decide to modify the institutional defendant's plan, adopt a plan submitted by another entity, or formulate a plan of its own that will satisfy the defendant's liability.'" 392 F.3d at 475 (quoting 283 F. Supp. 2d at 142). The Court declared that "[t]his is in sharp contrast with Southern Utah's point that '§ 706(1) empowers a court only to compel an agency ... to take action upon a matter, without directing how it shall act.'" Ibid. (quoting 124 S. Ct. at 2379).

The Court determined that the requirement that Interior file a To Be Plan "in some respects continues or logically extends the original order to file the Comprehensive Plan," which the Court's 2003 decision had upheld as "'akin to an order ... relat[ing] only to the conduct or progress of litigation.'" 392 F.3d at 474 (quoting Cobell v. Norton, 334 F.3d at 1138). The Court stressed, however, that the plan could not be used "as a device for indefinitely extended all-purpose supervision of the defendants' compliance with the sixteen general fiduciary duties listed." Ibid. This Court held that "the [district] court's authority is limited to considering specific claims that Interior breached particular statutory trust duties, understood in light of the common law of trusts, and to ordering specific relief for those breaches." Id. at 477. The district court "may not micromanage court-ordered reform efforts undertaken to comply with general trust duties enumerated by the court,

and then subject defendants to findings of contempt for failure to implement such reform." Id. at 478.

C. Reinstatement of the Accounting Injunction.

The Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, which was signed into law on December 8, 2004, did not contain the language of Pub. L. No. 108-108 set to expire on December 31, 2004.

On remand, plaintiffs – who had not sought a structural injunction in the first place – did not ask the district court to reissue the historical accounting portion of the injunction. Instead, plaintiffs renewed their position (opposed by the government) that an accounting is impossible and that the court should, accordingly, devise some other form of relief.

Nevertheless, on February 23, 2005, the court decided to "reissue without modification" the historical accounting provisions of the structural injunction vacated by this Court. Mem. Op. 3. The district court incorporated by reference the lengthy opinion that it had previously issued in connection with the 2003 structural injunction, see id. at 3 & n.1, and announced that it would retain jurisdiction over the matter until March 27, 2011, see id. at 14.

The district court saw no need to revisit the requirements of its order in light of this Court's decision vacating the structural injunction. In the district court's view, the only germane aspect of this Court's decision was the holding that "Public Law 108-108 deprived the 'historical accounting' provisions of the Structural Injunction of its basis in law." Id. at 2. The district court announced that the remainder of this Court's discussion was "not relevant for the present purpose." Ibid. The district court felt free to reissue the injunction because this Court "did not disturb the findings of fact and conclusions of law upon which the 'historical accounting' provisions of this Court's Structural Injunction are predicated." Id. at 3. Although the district court noted this Court's determination that aspects of the structural injunction were beyond the court's equitable power, it found that these rulings provided no guidance because of the "fact-sensitive nature of the Court of Appeals' decisions regarding the outer bounds of this Court's equitable authority." Id. at 4.

The district court reissued the historical accounting provisions of the structural injunction and also reissued "General Provisions" stating that the provisions of the injunction must be construed in

accordance with the reasonable interpretation most consistent with "the 'most exacting fiduciary standards' demanded of a trustee," absent clarification by the court. Injunction, §§ II(B), (C). The court also reissued the directive that Interior "administer the Trust in compliance with applicable Tribal law and ordinances," id., § II(D), although this Court had specifically held this provision "impermissible." 392 F.3d at 475.

The injunction reimposes the deadlines in the original structural injunction for compliance with its array of requirements. The district court noted, however, that it was subtracting from the longer-term time periods set forth in the original injunction the 52 days that had elapsed between its issuance and this Court's stay, because it "presume[d] that Interior was working toward completion of the various tasks set forth in the Structural Injunction during that time." Mem. Op. 3-4 n.2.

The order issuing the injunction also denies a stay pending appeal. See id. at 14-15. The district court declared that "due to a delay directed by Congress in a bizarre and futile attempt at legislating a settlement of this case, the merits of this Court's September 25, 2003 Structural Injunction have still not been decided," and concluded that a stay pending appeal would be inappropriate because "[t]he defendants have not demonstrated to this Court that they are entitled to such relief." Id. at 14. The district court expressed the hope that "the defendants' next appeal will be truly expedited" and would resolve the issues in the case. Ibid. The district court declared that "[i]n this case the government has not only set the gold standard for mismanagement, it is on the verge of setting the gold standard for arrogance in litigation strategy and tactics." Id. at 15. The district court closed by requesting that "the Court of Appeals expedite this case while there is still a chance to provide meaningful relief to these Indians who have been so grievously wronged by the government's misconduct." Ibid.[3]

REASONS WHY THE STAY SHOULD BE GRANTED

I. THE GOVERNMENT'S APPEAL WILL SUCCEED ON THE MERITS.

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[3] The district court also ordered briefing on the effect of this Court's December 10, 2004 decision on the non-historical accounting aspects of the original structural injunction. See Mem. Op. 15. The government does not seek a stay of this briefing order.

The district court has reissued a historical accounting injunction that, as Congress and this Court observed, is expected to cost more than $6 billion. 392 F.3d at 466. The decision pays no heed to the views of Congress or the rulings of this Court.

As this Court explained, Pub. L. No. 108-108 was enacted "to clarify Congress's determination that Interior should not be obliged to perform the kind of historical accounting the district court required." Ibid. (emphasis added). The conference committee "'reject[ed] the notion that in passing the American Indian Trust Management Reform Act of 1994 Congress had any intention of ordering an accounting on the scale of that which has now been ordered by the Court. Such an expansive and expensive undertaking would certainly have been judged to be a poor use of Federal and trust resources.'" Ibid. (quoting H.R. Conf. Rep. 108-330, at 118). As this Court explained, individual legislators indicated that "the disparity between the costs of the judicially ordered accounting, and the value of the funds to be accounted for, rendered the ordered accounting, as one senator put it, 'nuts.'" Ibid. (quoting 149 Cong. Rec. at S13,786 (2003) (statement of Sen. Dorgan)). As Senator Burns declared: "'If there is one thing with which everybody involved in this issue seems to agree, it is that we should not spend that kind of money on an incredibly cumbersome accounting that will do almost nothing to benefit the Indian people.'" Ibid. (quoting 149 Cong. Rec. S13,785 (2003)). The new legislation underscored the same view set out in the "Misplaced Trust Report" that gave rise to the 1994 legislation. That report cautioned that it would make "little sense to spend" even as much as the $281 million to $390 million that had been estimated as the cost of auditing the IIM accounts "when there was only $440 million deposited in the IIM trust fund for account holders," at the time of the report. H.R. Rep. No. 102-499, at 26 (1992).

Consistent with these views, Congress appropriated $58,000,000 for historical accounting activities (for individuals and Tribes) in FY 2005, see Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, Title I (appropriations for Office of Special Trustee for American Indians, Federal Trust Programs), and expressly provided that "total funding for historical accounting activities shall not exceed amounts specifically designated in the Act for such purpose," see id. § 112.

In reissuing the injunction, the district court attached no significance to Congress's views,

dismissing Congress's evident concern with the accounting injunction as "a bizarre and futile attempt at legislating a settlement of this case[.]" Mem. Op. 14.

The district court likewise improperly dismissed this Court's legal analysis as irrelevant. This Court made clear that it is not the role of a court to determine the content of an agency plan and dictate the means for achieving it. The Court rejected the district court's view, set out in the accounting portion of the 2003 ruling, that "[i]f the court [concludes that the plan will not satisfy defendants' legal obligation], it may decide to modify the institutional defendant's plan, adopt a plan submitted by another entity, or formulate a plan of its own that will satisfy the defendant's liability.'" 392 F.3d at 475 (quoting 283 F. Supp. 2d at 142). As this Court stressed, a court may compel an agency to act; but it must do so "'without directing how it shall act.'" Ibid. (quoting 124 S. Ct. at 2379).

This Court also made clear that the district court could not properly dictate the means and methodologies used in the accounting. This Court contrasted its earlier approval of the district court's "expression of intent to leave [the] issue of choice of accounting methods, including statistical sampling, to administrative agencies," id. at 473 (citing 240 F.3d at 1104), with the district court's September 2003 order "forbidding use of statistical sampling," ibid. (citing 283 F. Supp. 2d at 289). The district court nonetheless reissued the same provisions banning the use of statistical sampling cited with disfavor by this Court. Similarly, the injunction's detailed provisions, including those governing the manner in which Interior should gather and process records, ignore this Court's directives. As this Court made clear, judicial micromanagement, which is proscribed by principles governing judicial review of agency action, is likewise without foundation in the context of private trusts. The Court stressed that even private trustees "are generally free of direct judicial control over their methods of implementing these duties, and trustee choices of methods are reviewable only 'to prevent an abuse by the trustee of his discretion.'" 392 F.3d at 473.

The district court failed as well to revisit the legal basis of the substantive requirements incorporated into its injunctive order, including the requirements that the district court itself acknowledged to be without connection to a statute. This Court made clear that enforceable duties must be anchored in a statute, even if the statute is to be read in light of common law trust principles.

This Court emphasized that its initial decision had held that the "government's duties must be 'rooted in and outlined by the relevant statutes and treaties,' 240 F.3d at 1099, although those obligations may then be 'defined in traditional equitable terms,' id." 392 F.3d at 472. Thus, as the Court stressed, enforceable common law duties may not be "abstracted . . . from any statutory basis." Id. at 471.

The district court attached no significance to this guidance. As the government explained in detail in its briefs on appeal from the original structural injunction, the parameters of the "accounting" ordered by the district court have no nexus to any statutory requirement. For example, the district court recognized that the 1994 Act requires an accounting for funds deposited or invested pursuant to the 1938 Act, and thus does not require an accounting for funds deposited or invested prior to 1938. See 283 F. Supp. 2d at 172-73. Nonetheless, the district court held that the government has a fiduciary duty – without identified connection to any statute – to account for all funds deposited or invested in IIM accounts since the Indian land trusts were first created in 1887. Id. at 173. Interior estimates that an accounting for funds deposited pursuant to the 1938 Act in accounts open as of 1994 or thereafter would encompass roughly 30 million transactions. The district court's injunction would require Interior to account for more than 60 million IIM transactions. See Cason Decl. at 5-6. Moreover, the injunction would require Interior to verify each transaction individually, a monumental task made even more difficult by the fact that the additional transactions encompassed by the injunction largely involve resort to paper records. See ibid.

Similarly, although the 1994 Act requires an accounting for funds, the injunction requires an accounting for all "assets," i.e., lands, held in trust since the 1887. Injunction, § III(G); see 283 F. Supp. 2d at 175-77. The injunction thus ignores the language of the statute as well as this Court's observation that "funds have quite a different legal status from the allotment land itself." 392 F.3d at 464. Contrary to the district court's understanding, there is no unitary or monolithic "Indian trust." The land held in trust for an individual Indian and the funds held in trust for the same individual are distinct, and each individual's IIM account is separate from that of other individual Indians. Indeed, although there may be interaction between the separate trusts – income from revenue-producing trust lands held for the benefit of an individual Indian is often deposited in an IIM account for that

individual – some IIM accounts contain no land-based revenue, and many trust lands are not revenue-producing at all, or produce revenue that is paid directly to the individual Indian.

The injunction's requirements transform the accounting activities envisioned by Congress beyond recognition. As a practical matter, the district court's ruling would require Interior to reconstruct the entire process of "fractionation" of land that, as the Misplaced Trust report observed, has yielded over the past century land ownership interests recorded to the 42nd decimal point. H.R. Rep. No. 102-499, at 28; see also id. at 28 n.94 ("One 320-acre tract at the Standing Rock reservation has 542 owners, including 531 individual Indians and 11 tribal or other owners. The land size equivalent of the smallest ownership interest in that tract is smaller than the dimensions of this page [0.35 square feet or 7.1 inches by 7.1 inches]."). This endeavor (assuming that it is even feasible) would dwarf the task of accounting for the funds in the IIM accounts.

This Court has made clear that the district court is not free to mandate a multi-billion dollar accounting without regard to whether Congress has authorized (much less required) such an undertaking. As this Court explained, this basic limitation on judicial review cannot properly be circumvented by an inapt analogy to private trusts. As the Court stressed, "while the expenditures that plaintiffs seek are to be made out of appropriated funds, trust expenses for private trusts are normally met out of the trust funds themselves[.]" 392 F.3d at 473. Here, in contrast, the district court has ordered the expenditure of billions of dollars to provide an accounting for funds currently totaling approximately $400 million. Congress clearly did not authorize that result, which is without counterpart in the law of private trusts upon which the district court purported to rely. This Court's observation with regard to the "Fixing the System" aspect of the injunction is equally pertinent to the accounting portion of the injunction, now reissued without modification. As this Court declared, "rather than acting to assure that 'agency action' conforms to law, the court has sought to make the law conform to the court's views as to how the trusts may best be run." 392 F.3d at 477.

II. BALANCE OF HARMS AND THE PUBLIC INTEREST.

As discussed, the district court fundamentally erred in constructing an "accounting" of a nature and scope that has no roots in any statutory requirement that requires expenditure of billions of dollars

never contemplated by Congress. Even if the legal flaws of the injunction were not evident, the court's decision to reissue its injunction without regard to its costs and benefits would warrant a stay. In enacting Pub. L. 108-108, Congress estimated that the accounting injunction would require expenditure of between $6 to $12 billion, and the declaration submitted to the district court when it first issued the structural injunction contained a similar estimate. Interior now believes that the cost may be even higher. See Cason Decl. at 4-5, 12.

Congress observed that the reallocation of resources required by the injunction "would be devastating to Indian country and to the other programs in the Interior bill." H.R. Conf. Rep. 108-330, at 117. As the committee report explained, the expenditure of billions of dollars on an accounting "would not provide a single dollar to the plaintiffs, and would without question displace funds available for education, health care and other services." Ibid.

It was incumbent upon the district court to address those concerns before reissuing its injunction without modification. The court did not do so, and it remains entirely unclear what the expenditure of billions of dollars would accomplish for the plaintiff class.

The structural injunction contains a variety of deadlines commencing April 24, 2005. While each of these deadlines is significant in itself, two overarching points bear emphasis.

First, the deadlines do not refer to action contemplated by the Interior plan, and the actions that the order compels would not advance completion of the accounting activities contemplated by Interior. As discussed above, the injunction requires a re-creation of all transactions related to funds and land from 1887 onwards as a condition for providing an accounting to current account holders. To provide an accounting for funds deposited in IIM accounts since 1938, using statistical sampling for verification purposes, Interior would generally work backwards from the present, a method that would require different tasks in a different order and would allow completion of accounting for many IIM accounts far in advance of the very different accounting contemplated by the district court.

Even the court's most immediate deadline, dealing with collection of third-party records, reflects this fundamental divergence. Interior would first look to the millions of documents in its possession and then seek to fill any gaps by seeking information from third parties. Under the district

court's order, however, Interior would be forced to focus immediately on a detailed plan to obtain outside records including the use of potentially large numbers of subpoenas (see Injunction, § III(B)). Such record-gathering would be largely unnecessary and extremely burdensome to third parties as well as Interior, costing the government an estimated sum in the hundreds of millions of dollars. See Cason Decl. at 10.

Second, even to comply with the more distant deadlines of the Structural Injunction would require Interior immediately to reallocate resources to perform tasks that Interior would not otherwise perform and are not part of the accounting activities contemplated by Congress. For example, as noted, the injunction doubles the number of transactions that form part of the accounting and requires that each transaction be verified individually without use of sampling. See Cason Decl. at 5-6. An attempt to perform this redefined accounting would require immediate and substantial expenditures on equipment and personnel that would ultimately yield little if anything of value to the public or account holders. See id. at 5-6, 11.

The deadlines reflect the court's attempt to take control over both the general substance and detailed particulars of the accounting:

Within 60 days of the court's ruling – April 24, 2005:

- File a detailed plan for identifying trust-related records likely to be possessed by third-parties and for issuing subpoenas to those entities. Injunction, § III(B).
- File a detailed plan describing, among other things, the quality control measures of the Interior Accounting Plan. Id., § III(O).

Within 90 days of the court's ruling – May 24, 2005:

- File a timetable for completing the collection and indexing of records related to trust accounts, including a complete explanation of indexing methods. Id., § III(C).
- File a detailed plan describing each of five system tests described in the Interior Accounting Plan. Id., § III(N).
- File a detailed timetable for completion of the historical accounting, including specified dates for important milestones, including completion of the collection process, accounting process, and reporting process. Id., § IV(B)(1).
- File a timetable for completion of the entire indexing process of trust-related records to be undertaken as part of the historical accounting. Id., § IV(B)(2).

Within 120 days of the court's ruling – June 23, 2005:

- File a plan that analyzes, among other things, use of "industry production data bases" in conjunction with an accounting. Id., § III(P).

The injunction would direct expenditure of limited funds and resources in the service of a multi-billion dollar "accounting" that would provide no benefit to class members. In so doing, it would delay Interior's ongoing efforts in the preparation of statements of account for IIM account holders. To date, about $111 million has been obligated for historical accounting activities. As of December 31, 2004, Interior has performed an accounting for 36,701 judgment accounts with balances totaling almost $53 million, and has reconciled 7,360 per capita accounts. Also as of December 31, 2004, for special deposit accounts totaling over $40.8 million, Interior had completed its accounting and either closed the account, converted the account to a proper account type, or had residual balances in the account distributed to the proper parties. See Cason Decl. at 3. And, consistent with annual appropriations, Interior continues to move forward with respect to underlying records collection, indexing, imaging, and coding activities. See id. at 12. While, as noted, cost estimates for the Interior plan submitted in response to judicial order are subject to increase, a substantial body of records exists upon which an accounting can be based, and the agency continues to seek the most cost-effective techniques to produce accurate account statements consistent with the parameters set by Congress. See ibid. Compliance with the district court's injunction would require immediate and radical redeployment of resources from these efforts.

Although the district court condemned the government for "setting the gold standard for mismanagement," Mem. Op. 15, and declared that its injunction was required to avoid unreasonable delay, it should be clear that these assertions are without basis. Since 1999, the only proceeding that attempted, even in part, to determine whether the government had delayed in the performance of an accounting was the 2002 contempt trial. Although the district court held Secretary Norton in contempt and declared that she could take her place "in the pantheon of unfit trustee-delegates," 226 F. Supp. 2d at 161, this Court vacated that ruling, explaining that even in her first year in office Secretary Norton had taken "significant steps toward completing an accounting," and that the facts were

"inconsistent" with a finding that Secretary Norton failed to "initiate an historical accounting project." 334 F.3d at 1148. The district court's rhetorical assaults are without basis in any record proceeding.

As noted, Interior has continued to make substantial progress toward the completion of account statements. It has done so despite the fact that the district court, from the commencement of the contempt proceedings in the fall of 2001, has purported to dictate the methods and content of its accounting activities, precluding the use of essential tools such as statistical sampling, and imposing requirements bearing no relation to available funding or congressional intent that finally prompted Congress to enact Pub. L. 108-108. The government is as eager as the district court to obtain an early resolution of this appeal, so that it may proceed with discharging the responsibilities vested by Congress in the Department of Interior.

CONCLUSION

The district court's February 23, 2005 injunction should be stayed pending appeal.

Respectfully submitted,

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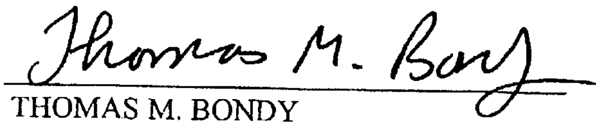
MARCH 2005

ADDENDUM

CERTIFICATE AS TO PARTIES AND AMICI

Pursuant to Circuit Rules 8 and 28(a)(1)(A), undersigned counsel certifies that the named plaintiffs in this action are Elouise Pepion Cobell; Earl Old Person, Penny Cleghorn; Thomas Maulson; and James Louis Larose. The district court has certified a plaintiff class consisting of present and former beneficiaries of Individual Indian Money ("IIM") accounts, excluding those who had filed their own actions prior to the filing of the complaint in this case.

Defendants are Gale A. Norton, as Secretary of the Interior; the Assistant Secretary of Interior for Indian Affairs; and John W. Snow, as Secretary of the Treasury.



THOMAS M. BONDY

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