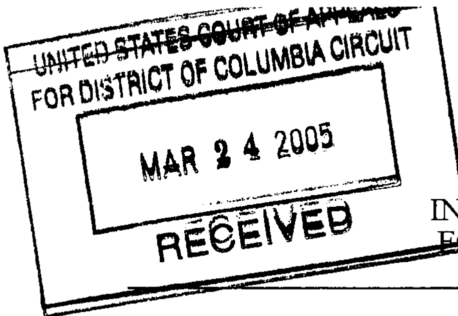

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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

REPLY IN SUPPORT OF EMERGENCY MOTION FOR STAY PENDING APPEAL AND EXPEDITION, AND RESPONSE IN OPPOSITION TO MOTION TO REMAND

INTRODUCTION AND SUMMARY

Plaintiffs make two incompatible arguments. They contend that it is impossible to implement the structural injunction in a manner that would produce an adequate historical accounting, and seek a remand on that basis. See, e.g., Response at 9 ("the structural injunction [is] impossible to implement to produce an adequate historical accounting"). At the same time, they oppose a stay, insisting that immediate compliance with the injunction is essential to protect the plaintiff class from irreparable harm. Both assertions cannot be true, and it is clear from plaintiffs' submission that they have no basis for opposing a stay of an injunction that the plaintiff class never sought.

It is equally clear that there is no basis for a remand. Contrary to plaintiffs' contention, the injunction – first issued in 2003, and now reissued in 2005 – reflects the considered judgment of the district court. The injunction should be stayed, and, consistent with the district court's express request, see Mem. Op. at 14-15, its merits reviewed on an expedited basis.

In the government's view, an accounting consistent with the 1994 Act is in no way impracticable. Indeed, as noted in our stay motion, significant accounting work has already been done and additional work is underway. See Stay Motion at 19; Cason Decl. at 3, 12. It is clear, however, that the district court has a radically different understanding of the government's

accounting obligations. The structural injunction would derail Interior's ongoing efforts to produce the account statements required by the 1994 Act, and a remand would only prolong the period in which the propriety of Interior's accounting efforts remains open to question.

Given plaintiffs' contention that it would be pointless for Interior to attempt to implement the structural injunction, it is unclear on what basis they can oppose a stay. Plaintiffs have long maintained that deficiencies in trust records render an adequate accounting impossible and have thus urged the district court to devise some form of substitute relief. As long ago as January 2003, plaintiffs asserted that "the accounting owed by the United States and ordered by [the district court] is impossible," Response, Exh. A, at 3, and urged the district court to adopt a model that would, in plaintiffs' view, reflect the revenue generated by their trust assets over more than a century (placing on Interior the burden of showing that the amounts posited by the model had been validly disbursed, with interest), see id. at 39-55. Likewise, on remand from this Court's December 2004 decision vacating the original structural injunction, plaintiffs did not seek its reissuance, but instead renewed the contention that any accounting effort is futile and that the district court should "adopt alternative methods to ensure that the beneficiaries are paid at least what they are owed[.]" Dkt.# 2798, at 6 (filed 12/30/04). Even after the district court reissued the historical accounting portions of the structural injunction, plaintiffs have continued to adhere to this line of argument. Thus, they most recently proposed that the government be required to pay into a registry of the district court the estimated $13 billion in trust revenues collected over the lifetime of the trusts, to be distributed to the plaintiff class except to the extent that the government can prove that revenues collected were properly disbursed over the lifetime of the trusts, with interest. Dkt. # 2886, at 22-25 (filed 3/15/05).[1]

Plaintiffs do not dispute that the injunction would cost billions of dollars to implement. They make no effort to refute Congress's determination, cited by this Court, that it would be

[1] In the same filing, plaintiffs also proposed that the district court order "the removal of the Interior defendants as trustee-delegates," relief that plaintiffs described as an "intermediate remedy" within the inherent power of the district court. Dkt. # 2886, at 21.

"'nuts'" for the government "'to spend that kind of money on an incredibly cumbersome accounting that will do almost nothing to benefit the Indian people.'" Cobell v. Norton, 392 F.3d 461, 466 (D.C. Cir. 2004) (quoting the statements of individual legislators). And, as our stay motion explained, any effort to comply with the injunction would require immediate reallocation of the limited resources appropriated by Congress for historical accounting activities in FY 2005, away from Interior's ongoing accounting-related work and toward tasks that Interior would not otherwise perform and that form no part of the accounting directed by Congress. See Stay Motion at 17-19; Cason Decl. at 10-11.

Nor can plaintiffs square the reissued structural injunction with the principles announced by this Court in vacating the original structural injunction. This Court expressly held that common-law trust duties cannot be abstracted from a statutory basis. See 392 F.3d at 471. This Court declared as well that under the principles that constrain judicial review of agency action – and also under the principles that would govern review of the actions taken by a private trustee – a court may not micromanage the methods by which trust duties are implemented. See id. at 472-73. In that regard, this Court explicitly contrasted the district court's initial decision to "leave the choice of accounting methods, including statistical sampling," to the agency, with the provisions of the structural injunction "forbidding the use of statistical sampling." Id. at 473. Despite these rulings, plaintiffs make no attempt to harmonize the requirements of the injunction with the provisions of the 1994 Act, and they strive to defend the provisions that dictate the agency's accounting methods, including the provision barring the use of statistical sampling.

As the sampling ruling vividly illustrates, it is not the accounting mandated by Congress that is impracticable; it is the staggering, extra-statutory requirements imposed by the district court. The district court's prohibition on statistical sampling, considered in conjunction with various other injunctive requirements, adds several billion dollars to the cost of the accounting task, by requiring individual verification of each of approximately 60 million account transactions. See Cason Decl. at 5-7. Likewise, the injunction's separate requirement that

Interior account for all transactions in land since the inception of the trust – also without basis in the 1994 Act – adds an additional billion dollars to the structural injunction's cost. See id. at 8-9.

Plaintiffs' filing leaves no doubt that the injunction should be stayed. It is equally clear that no basis exists for a remand. Contrary to plaintiffs' suggestion, the reissued injunction reflects the firm and unyielding judgment of the district court. The district court is well aware of plaintiffs' view that an adequate accounting is impossible; that has been plaintiffs' position since at least 2003. See, e.g., Cobell v. Norton, 283 F. Supp. 2d 66, 207 (D.D.C. 2003) ("The Plan advocated by plaintiffs' is premised on the notion that 'the accounting owed by the United States government and ordered by this Court is impossible.'") (quoting plaintiffs' plan at 3). The district court is also fully aware of the injunction's multi-billion dollar price tag – a feature that was highlighted both in this Court's December 2004 decision and in the congressional statements cited by this Court. See 392 F.3d at 466. The district court nevertheless believed it appropriate to reissue the historical accounting portions of the injunction. In so ruling, the district court expressly asked that the merits of its injunction be considered on appeal, and that they be considered on an expedited basis. See Mem. Op. 14-15; see also March 7, 2005 Letter from Judge Lamberth to Court of Appeals Clerk Mark Langer (asking the Clerk to bring to the Court's attention pages 14-15 of the ruling reissuing the injunction, denying a stay and requesting expedition). Against this backdrop, no credible basis exists for opposing the government's motion for a stay pending appeal and for expedition of the appeal.

ARGUMENT

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

The district court has reissued a historical accounting injunction that, as plaintiffs do not dispute, would cost billions of dollars to implement. On the merits, plaintiffs cannot reconcile the injunction with the views of Congress or with the principles announced by this Court in its December 2004 ruling vacating the original injunction.

As this Court explained, Congress enacted Pub. L. No. 108-108 "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 (emphasis added). The conference committee "'reject[ed] 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. 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). These statements echoed Congress's statements in the 1992 "Misplaced Trust Report," which 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).

Plaintiffs attach no significance to the views of Congress, which they do not discuss. Nor do plaintiffs attempt to reconcile the provisions of the injunction with the terms of the 1994 Act. In vacating the original injunction, this Court made clear that enforceable duties must be grounded in statutory requirements, although the interpretation of statutory terms may be informed by common law trust principles. See 392 F.3d at 471-72, 473. Plaintiffs, however, renew the contention that enforceable duties "can be expressed in the statute or **implicitly created**," Response at 19 (plaintiffs' emphasis), and assert that the district court properly measured Interior's accounting plan "by the standards required by trust law," id. at 20.

For example, plaintiffs do not dispute that the 1994 Act requires the production of account statements only for accounts that were open in 1994 or thereafter. See Response at 22. By its terms, the 1994 Act requires Interior to "account for the daily and annual balance of all funds held in trust" for the benefit of individual Indians. Closed accounts have no balance, and the clear premise of the Misplaced Trust report was that account statements would be produced only for the roughly 300,000 open accounts. See, e.g., H.R. Rep. 102-499, at 26 ("it may be necessary to review a range of sampling techniques and other alternatives before proceeding with a full accounting of all 300,000 accounts in the Indian trust fund"). Indeed, the closing of an account terminates the trust relationship and corresponding trust duties. Nonetheless, plaintiffs

defend the district court's requirement that Interior produce statements of account for all IIM accounts that have ever been in existence, see Response at 22, regardless of whether the account is long closed and the account holder long deceased. Plaintiffs do not explain what purpose would be served by such an exercise.

Plaintiffs likewise disregard this Court's admonition that the district court may not dictate the methods by which Interior implements its accounting responsibilities. As this Court explained, basic principles governing review of agency action empower the district court "'only to compel an agency ... to take action upon a matter, without dictating how it shall act.'" 392 F.3d at 475 (quoting Norton v. Southern Utah Wilderness Alliance, 124 S. Ct. 2373, 2379 (2004)). These principles retain force in the present trust context, where, as this Court noted, trust expenditures are made out of appropriated funds, and trust beneficiaries are thus "free of private beneficiaries' incentive not to urge judicial compulsion of wasteful expenditures." Id. at 473. Indeed, as this Court observed, even "private trustees, although held to high fiduciary standards, are generally free of direct judicial control over their methods of implementing their duties," and the courts intervene only to prevent an abuse of discretion. Ibid.

Having announced these principles, this Court contrasted its 2001 decision, which approved the district court's expression of intent to leave the choice of accounting methods, including statistical sampling, to the agency, with the provision of the structural injunction forbidding the use of statistical sampling. See id. at 473. As discussed in the stay motion, under the Interior plan, sampling would not be used to generate the statements of account, but only to verify the reliability of the underlying records used to prepare the statement. See Stay Motion at 6-7. The use of sampling was crucial to the viability of the plan, and reflected the fact that the vast majority of transactions involve relatively small sums of money. See Cason Decl. at 4. Nonetheless, plaintiffs defend the district court's requirement that Interior verify individually every transaction covered by the injunction, regardless of size and date, without use of statistical sampling. See Response at 22. In defending this extraordinary requirement, plaintiffs merely

quote two sentences of the district court's decision which, as our stay motion explains (at p.7), conflated the accounting and audit components of Interior's plan.

Plaintiffs likewise purport to defend the district court's assertion of jurisdiction over the minutiae of the agency's performance of its accounting responsibilities. For example, the district court recognized in its structural injunction opinion that the federal government already held approximately 195,000 boxes of trust documents, see 283 F. Supp. 2d at 153, and that Interior intended to collect records from third parties such as oil and timber companies only if a data gap was discovered that could not be addressed with existing federal records, see id. at 156. The district court rejected this gap-filling approach, however, and ruled that Interior instead must identify and subpoena all third-party records without delay. See id. at 156-60. Thus, the injunction declares that "the Interior defendants are under an obligation to recover missing trust records where possible," and directs Interior to submit a plan – by April 24, 2005 – for determining which trust records are likely to be possessed by entities outside the federal government, identifying the trust-related records maintained by such entities, and also for issuing a potentially massive number of subpoenas, where appropriate, to ensure that trust-related records will be preserved. See Injunction, § III(B).

The district court had no basis for second-guessing the agency's judgment. Although the court professed concern about possible record-destruction, Interior addressed that issue in a February 6, 2002 Federal Register notice requesting that persons possessing records relating to IIM trust funds preserve those records and notify the Department, 67 Fed. Reg. 5,607 (2002), and in a subsequent notice establishing the policy and procedures to be followed in collecting records from third parties, 68 Fed. Reg. 23,756 (2003). The district court apparently believed that resources should have been devoted to subpoena enforcement in the first instance. However, a plan that must await an initial response to burdensome subpoenas (which may well become the subject of ancillary litigation), is hardly calculated to result in less delay than the approach proposed by Interior. The district court's ruling reflects no appreciation for the sheer numbers of entities that would be subject to subpoenas, including countless small businesses who might well

find this type of burden a deterrent to future business relations with individual Indians. More fundamentally, the district court had no authority to micromanage this and the host of similar activities undertaken by the agency in the course of performing its accounting responsibilities. As this Court stressed in its 2004 ruling, 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.'" 392 F.3d at 475 (quoting Southern Utah, 124 S. Ct. at 2379). "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." Id. at 472 (quoting Southern Utah, 124 S. Ct. at 2381).[2]

II. A STAY WILL NOT HARM CLASS MEMBERS, AND ABSENT A STAY THE GOVERNMENT AND THE PUBLIC WILL SUFFER IRREPARABLE HARM.

In enacting Public L. No. 108-108, Congress observed that the reallocation of resources required by the 2003 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.

In reissuing the injunction, the district court did not address these concerns, and plaintiffs make no effort to explain how implementation of the injunction's myriad requirements could possibly benefit the plaintiff class. To the contrary, plaintiffs themselves take the view that "the structural injunction [is] impossible to implement to produce an adequate historical accounting."

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[2] In seeking to resist these principles, plaintiffs invoke this Court's decision vacating the injunction ordering Interior to disconnect its computer systems from the Internet. See Cobell v. Norton, 391 F.3d 251 (D.C. Cir. 2004). The scope of the district court's authority in that context, however, was affected by a consent order. "Given the admissions in the Consent Order of Interior's past gross computer security failures, and the 'impasse' between the parties regarding the manner in which the Consent Order should be implemented," id. at 258, this Court held that the district court had authority to enforce the consent order by requiring the Secretary to produce a workable plan, see ibid.

Response at 9. Plaintiffs' opposition to a stay of an injunction that plaintiffs themselves regard as pointless – and that they never sought – is mystifying.

There can be no doubt that implementation of the structural injunction would harm the class that plaintiffs purport to represent, as well as the government and the public. 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. As our stay motion explained, compliance with the injunction would require immediate reallocation of these limited resources away from Interior's ongoing accounting activities and toward tasks that form no part of the accounting obligations imposed by Congress. See Stay Motion at 17-19.

As our motion stressed, the deadlines imposed by the district court do not refer to action contemplated by the Interior plan, and the actions that the injunction compels would not advance completion of the accounting activities contemplated by Interior. The injunction effectively 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. By contrast, to provide an accounting for funds deposited in relevant IIM accounts since 1938, using statistical sampling for verification purposes, Interior would generally work backwards from the present, a method that would call for the performance of 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. See ibid.

Even compliance with the injunction's more distant deadlines would require the diversion of resources now. 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. Any attempt to perform this redefined accounting would require the addition of thousands of Interior or contractor employees as well as thousands of additional

computers, with no apparent benefit to the public or account holders. See id. at 11. And it is plain that the district court expects immediate efforts towards compliance with the injunction's longer-term deadlines. Indeed, in the order reissuing the injunction, the district court indicated that it was subtracting from the longer-term time periods set forth in the original injunction the fifty-two days that had elapsed between its initial 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. at 3-4 n.2.

The court's more immediate deadlines not only waste resources on tasks that Interior would not otherwise perform; they place Interior in the untenable position of developing and submitting "plans" for activities that it regards as misguided and that do not fall within the scope of congressional appropriations. See Cason Decl. 10, 11. For example, as discussed above, Interior's plan is to obtain records from third parties only as necessary to fill in gaps in trust records. By contrast, the injunction declares that "the Interior defendants are under an obligation to recover missing trust records where possible," and directs Interior to submit a plan – by April 24, 2005 – for identifying trust records in the hands of third parties and for issuing subpoenas. See Injunction, § III(B). Interior estimates that this court-directed effort to preserve or retain all documents that might be relevant to historical accounting activities, including the use of subpoenas, would in and of itself cost in the hundreds of millions of dollars. See Cason Decl. at 10.[3]

In sum, the injunction would direct expenditure of limited funds in the service of multi-billion dollar "accounting" requirements that would provide little if any benefit to class members and that radically expand the accounting activities contemplated by Congress. In so doing, the

[3] Plaintiffs assert (at p.13) that the stay motion is "premature" because the district court's order allows the government to move in the district court to amend deadlines for good cause. A party may always seek relief from an injunction for good cause, particularly when the district court has retained jurisdiction. That ability does not frustrate a litigant's ability to appeal or seek an appellate stay, especially where, as here, the injunction as a whole embodies a fundamentally mistaken conception of its applicable legal obligations.

injunction would waste scarce resources and seriously impede Interior's ongoing efforts in the preparation of statements of account for IIM account holders pursuant to the 1994 Act. See Stay Motion at 19; Cason Decl. at 3. The injunction should thus be stayed, pending an expedited appeal.

III. THERE IS NO BASIS FOR A REMAND.

As discussed above, plaintiffs themselves characterize the injunction as pointless but suggest that a remand is needed to allow the district court to consider that fact. Contrary to plaintiffs' assertion, see Response at 11, there could be no remand without an order vacating the injunction, which is subject to appeal as of right. See 28 U.S.C. § 1292(a). More fundamentally, there is no basis for a remand of any kind, because the injunction reflects the considered judgment of the district court.

In reissuing the injunction, the district court was fully aware that the injunction would cost billions of dollars to implement. That point had been underscored by Congress in enacting Pub. L. No. 108-108 and by this Court in its December 2004 decision vacating the initial injunction. See 392 F.3d at 466.

Likewise, as discussed above, the district court has long been aware of plaintiffs' view that it is impossible for Interior to provide an adequate historical accounting. That was the position taken by plaintiffs two years ago in their proposed "accounting plan" and in the Phase 1.5 trial. See, e.g., 283 F. Supp. 2d at 207 ("The Plan advocated by plaintiffs' is premised on the notion that 'the accounting owed by the United States government and ordered by this Court is impossible.'") (quoting plaintiffs' plan at 3). In its 2003 decision, the district court did not accept plaintiffs' plan; instead, it imposed the structural injunction.

Similarly, on remand from the December 2004 decision vacating the structural injunction, plaintiffs again made clear their position that an adequate accounting of the IIM trust funds is not possible. See Dkt.# 2798. And, again, the district court did not embrace plaintiffs' position. Instead, the district court reissued the historical accounting provisions of the injunction without

modification. Indeed, the court was so convinced of the correctness of its course that it reissued the injunction without notice to the parties or the benefit of briefing.

The injunction thus reflects the district court's unwavering vision of Interior's accounting responsibilities. Under these circumstances, a remand would serve no purpose. Indeed, while plaintiffs purport to share the view that the structural injunction imposes requirements that would be impracticable to implement, they vigorously defend the district court's authority to enter the injunction, embracing the court's premise that it may order an "accounting" without nexus to the terms of a statute. Plaintiffs profess concern about delay, but a remand pursuant to their suggestion would only prolong the period in which the propriety of Interior's ongoing accounting activities remains open to question.

The district court has expressly asked that its injunction be reviewed on the merits and that the appeal proceed on an expedited basis. See Mem. Op. at 14-15. The government is just as eager as the district court for this Court's expedited determination of the nature and scope of Interior's statutory accounting responsibilities. The injunction should be stayed pending expedited appeal, and the motion to remand should be denied.

CONCLUSION

The district court's February 23, 2005 injunction should be stayed pending expedited appeal, and plaintiffs' motion for a remand should be denied.

Respectfully submitted,

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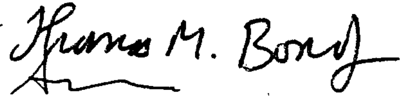
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MARCH 2005

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of March, 2005, I caused copies of the foregoing reply to be sent to the Court and to the following counsel by hand delivery:

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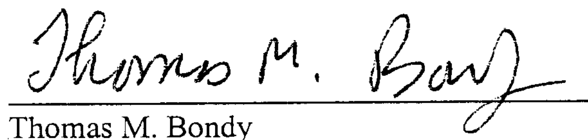

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