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-____

[Civil Action No. 96-1285 (D.D.C.)]

EMERGENCY MOTION FOR STAY OF JULY 12, 2005 ORDER PENDING ORAL ARGUMENT ON THE STRUCTURAL INJUNCTION APPEAL (APPEAL NO. 05-5068), AND PENDING FURTHER ORDER OF THIS COURT

INTRODUCTION AND SUMMARY

Pursuant to Rule 8 of the Federal Rules of Appellate Procedure and 28 U.S.C. 1651, defendants-appellants, the Secretary of the Interior, et al., respectfully ask this Court to stay the order entered by the district court on July 12, 2005 (Docket #3072), pending the September 16, 2005 oral argument on the government's appeal from the structural injunction entered in this case, see Appeal No. 05-5068, and pending further order of this Court. Compliance with the July 12 order is required beginning **Tuesday, August 2, 2005.** We thus request an immediate administrative stay to permit the Court to consider this motion on the merits. A notice of appeal from the July 12 order and motion to stay the order were filed with the district court on July 25, 2005. The district court has not yet ruled on the government' s stay request. Because of the imminent August 2 compliance date, we are filing this stay motion to enable this Court's timely consideration of the matter.[1]

As we explain below, the July 12 order is expressly linked to the structural injunction and could not survive its vacatur. In light of the September 16 argument on the structural injunction, this Court will be in a position to determine whether full briefing on the July 12 order would be useful.

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

Given the close relationship between this motion and the structural injunction appeal, we ask that this motion be considered by the panel assigned to the structural injunction appeal.

The July 12 order directs the Department of the Interior to include in all written communications with any of the hundreds of thousands of Native Americans comprising the class a notice that declares:

> Evidence introduced in the Cobell case shows that any information related to the IIM Trust, IIM Trust lands, or other IIM Trust assets that current and former IIM account holders receive from the Department of the Interior may be unreliable. Current and former IIM Trust account holders should keep in mind the questionable reliability of IIM Trust information received from the Department of the Interior if and when they use such information to make decisions affecting their IIM Trust assets.

Order at 2 (third emphasis added). The notice must accompany all written communications "without regard to subject matter," Op. 22, and its "functional effect" is to require that the notice accompany all written communications made by the Interior Department in the "ordinary course of business," Op. 21-22, including those having nothing to do with IIM accounts. The stated purpose of the order is to discourage trust beneficiaries from making trust-related decisions based on information supplied by Interior until the mammoth "accounting" ordered by the court in the structural injunction is complete. See Op. 18, 19, 20 & n.8.

The July 12 order is remarkable in every respect. Although it is explicitly premised on the structural injunction – which has itself been stayed by this Court, with oral argument imminent – the district court has required compliance with the order beginning August 2, 2005 and has not ruled on the government's motion for a stay pending appeal.

There is no known precedent for an order requiring a defendant to give notice, not of the existence of class action litigation or of the plaintiffs' allegations, but of the district court's preliminary assessment of unidentified "evidence" with the stated purpose of influencing the primary conduct of the class. But even apart from this fundamental defect, the order cannot survive the vacatur of the structural injunction. The premise of the July 12 order is that trust beneficiaries should not enter into trust-related transactions until the "accounting" ordered by the district court is

complete. As we have shown at length in our structural injunction briefs, the multibillion dollar "accounting" ordered by the district court should never be implemented. The district court had no power to order Interior to spend billions of dollars on an accounting endeavor that Congress has not authorized, much less required. As this Court explained, Congress has made clear that it never had "'any intention of ordering an accounting on the scale of that which has now been ordered by' the district court." Cobell v. Norton, 392 F.3d 461, 466 (D.C. Cir. 2004) (quoting H.R. Conf. Rep. 108-330, at 118). Indeed, "'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)).

Even plaintiffs do not suggest that the court-ordered accounting should be implemented. To the contrary, their principal argument on the structural injunction appeal is that the case should be remanded to the district court because the injunction is "impossible" to implement. Pl. Br. 6, 7-12.

Under the circumstances, there can be no serious contention that a stay of the July 12 order would cause the class members irreparable harm. Indeed, the order was issued nine years into the litigation and was not prompted by any event other than the filing of plaintiffs' motion for a class-wide notice, which was itself pending for more than eight months. See Docket #2746 (filed 10/27/04).

By contrast, a stay will prevent hundreds of thousands of persons from receiving the inherently misleading notice required by the district court – harm that cannot be undone. Without any pertinent evidence, the court declares that "all trust-related information Interior communicates to Indian beneficiaries is inherently unreliable," Op. 11, and orders Interior to warn trust beneficiaries of the "questionable reliability" of the information in order to discourage them from taking action on it. Order at 2. The district court condemns the Department of the Interior as a "degenerate" trustee of the Indian trusts. Op. 11. It declares that the "entire record in this case" reveals bureaucratic incompetence on a colossal scale and "outright villainy." Ibid. It denounces the "'modern' Interior department" as a "dinosaur – the morally and culturally oblivious hand-me-

down of a disgracefully racist and imperialist government that should have been buried a century ago, the last pathetic outpost of the indifference and anglocentrism we thought we have left behind." Op. 3. And against this asserted "background of mismanagement, falsification, spite, and obstinate litigiousness," the court purports "to evaluate the general reliability of the information Interior distributes to IIM account holders." Op. 11.

As our structural injunction briefs explain at length, there is no record evidence that could support the district court's extraordinary pronouncements. To the contrary, the record demonstrates an unswerving commitment by the government to implement the mandate of this Court's original decision in this case, Cobell v. Norton, 240 F.3d 1081 (D.C. Cir. 2001). See Reply Br. 4-7. The smattering of incidents described by the district court (Op. 4-11) reveals nothing about the present state of Interior's trust information and shows nothing but Interior's good faith.

STATEMENT

A. Background.

The extensive background of this case is set out in detail in our opening brief on the structural injunction appeal. 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 (IIM) 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 defendants had an enforceable duty to account for the balances in IIM accounts. Cobell v. Babbitt, 91 F. Supp. 2d 1, 28-31, 56 (D.D.C. 1999). In 2001, 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 held that agency action had been unreasonably delayed under governing APA standards, 5 U.S.C. 706(1), id. at 1108, and noted that the district court had properly remanded the matter to Interior, leaving to the agency the choice of how the accounting would be conducted. Id. at 1104, 1109.

In 2002, following a 29-day trial, the district court held Secretary Norton in contempt and declared that she and Assistant Secretary McCaleb could "rightfully take their place ... in the pantheon of unfit trustee-delegates." Cobell v. Norton, 226 F. Supp. 2d 1, 161 (D.D.C. 2002). Based on its contempt findings, the district court terminated the remand to the agency, id. at 152, and announced that it would issue structural injunctions governing the performance of accounting activities and trust management generally. Id. at 148-49. To that end, the district court ordered Interior to submit plans for an historical accounting and for achieving compliance with fiduciary obligations, to be evaluated, together with plans submitted by plaintiffs, in a "Phase 1.5" trial. The plan submitted by Interior in response to this order set out a program to complete an accounting meeting the requirements of this Court's 2001 decision within five years at a cost then estimated at $335 million, subject to congressional appropriations. Plaintiffs urged that an accounting was impossible and advocated a model that would, in their view, reflect the revenue generated by their trust assets over more than a century.

In July 2003, this Court vacated the contempt ruling, explaining that the record demonstrated that "in her first six months in office Secretary Norton took significant steps toward completing an accounting" and that the "uncontested facts" were "inconsistent with a finding that Secretary Norton failed to" initiate an historical accounting project. Cobell v. Norton, 334 F.3d 1128, 1148 (D.C. Cir. 2003). This Court described the district court's reasoning with respect to the remaining contempt charges as "mystifying," id. at 1149, and "inconceivable," id. at 1150.

In September 2003, the district court issued a sweeping "structural injunction" that encompassed both the performance of an accounting, and the implementation of a comprehensive

program of trust reform. Cobell v. Norton, 283 F. Supp. 2d 66 (D.D.C. 2003). In issuing the structural injunction, the district court stressed that it would treat its contempt findings as "established," notwithstanding this Court's decision vacating the contempt ruling. Id. at 85.

Congress responded to the injunction with legislation enacted in November 2003, as part of the FY 2004 Interior appropriations statute, Pub. L. No. 108-108. The legislation amended substantive law to remove any legal requirement to conduct historical accounting activities before the legislation's expiration on December 31, 2004.

On December 10, 2004, this Court vacated all aspects of the structural injunction, except for a single filing requirement contained in the non-accounting portion of the injunction. Cobell v. Norton, 392 F.3d 461 (D.C. Cir. 2004). This Court did not rule on the government's argument that the accounting provisions of the injunction were fatally flawed even without regard to Pub. L. No. 108-108. This Court explained, however, that the legislation had been enacted "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, noting that the order's initial cost estimates ranged from $6 billion to $12 billion, ibid. In vacating the remainder of the injunction, this Court rejected the district court's assertion that it could formulate and direct agency plans, stressing that the APA "'empowers a court only to compel an agency ... to take action upon a matter, without directing how it shall act.'" Id. at 475 (quoting Norton v. Southern Utah Wilderness Alliance, 124 S. Ct. 2373, 2379 (2004)).

On February 23, 2005, the district court – acting sua sponte and without briefing – reissued the accounting portion of the structural injunction without modification. The court dismissed Pub. L. No. 108-108 as "a bizarre and futile attempt at legislating a settlement of this case," 2/23/05 Mem. Op. 14, and concluded that this Court's decision vacating the structural injunction was "not relevant for the present purpose," id. at 2. The district court incorporated by reference the lengthy opinion that it had 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.

Although the district court purported to adopt a modified version of Interior's historical accounting plan, the requirements of the injunction 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 the enactment of the 1994 Act 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. By contrast, the injunction would also require Interior to provide statements describing and verifying all transactions in land since 1887. Moreover, the injunction would require Interior to provide account statements for all IIM accounts open at any time in history since 1887, regardless of whether the accounts were long closed.

This Court granted the government's request for a stay pending appeal and expedited briefing. Oral argument is scheduled for September 16, 2005.

B. The July 12, 2005 Order.

The July 12 order was issued in response to plaintiffs' "Motion to Require Defendants to Give their Beneficiaries Notice of their Continuing Inability or Refusal to Discharge their Fiduciary Duties." Docket #2746. The motion was filed in October 2004, eight years into the litigation, in the period between the oral argument and the December 2004 decision on the original structural injunction appeal. The motion did not cite any development in the litigation as the impetus for the motion.

The motion remained pending for more than eight months. Meanwhile, this Court vacated the original structural injunction; the district court reissued the historical accounting provisions of that injunction; and this Court stayed the reissued provisions.

On July 12, 2005, the district court granted plaintiffs' motion. The July 12 order requires that beginning August 2, 2005, Interior must include with any written communication to any current or former IIM account holder, a notice that states in relevant part:

> Evidence introduced in the Cobell case shows that any information related to the IIM Trust, IIM Trust lands, or other IIM Trust assets that current and former IIM account holders receive from the Department of the Interior may be unreliable. Current and former IIM Trust account holders should keep in mind the questionable reliability of IIM Trust information received from the Department of the Interior if and when they use such information to make decisions affecting their IIM Trust assets.

Order at 2 (third emphasis added). The order applies to every written communication with a current or former IIM account holder, "without regard to subject matter." Op. 22.

In the accompanying opinion, the court declared that "all trust-related information Interior communicates to Indian beneficiaries is inherently unreliable," Op. 21, citing the "factual record, composed of the accumulated detritus of nine years spent examining Interior's odious performance as Trustee-Delegate for the Indian trust," ibid. The court reasoned that "the underlying rationale for enforcing the right to an accounting is to facilitate informed decision-making with respect to the disposition of trust assets." Op. 18 (quotation marks omitted). In the court's view, "[t]hat means, at the very least, that the trust beneficiaries should retain all or most of their trust assets in as unaltered a state as practicable, until Interior completes the required accounting[.]" Ibid. (quotation marks omitted). Indeed, the court opined that "the only way to fully safeguard this right [to the court-ordered accounting] would be to suspend all trust-related decision-making until this case concludes and Interior actually provides the required accounting, so that the maximum number of decisions affecting trust assets could be as fully informed as possible." Op. 20 n.8. Because such a course of action was "impracticable," the court concluded that the class-wide notice "would have to suffice as an interim measure." Ibid.

REASONS WHY THE STAY SHOULD BE GRANTED

I. The Structural Injunction Is On Appeal And Has Been Stayed, And The July 12 Order Cannot Survive Vacatur Of The Structural Injunction.

Purporting to invoke its power under Rule 23(d) of the Federal Rules of Civil Procedure, the district court has ordered the Department of the Interior to include in all written communications to the hundreds of thousands of present or former IIM account holders a notice declaring, based on "evidence introduced" in the litigation, the "questionable reliability" of any trust-related information

received from Interior. This order is extraordinary even apart from the context in which it was issued. Rule 23(d) authorizes a district court in class action litigation to require a notice advising the class of procedural matters, such as the pendency of the litigation, the right to opt-out, or the proposed extent of the judgment.[2] Communications with class members may be regulated to protect against the types of abuses associated with class actions, such as barratry-like solicitation of nonparty class members, though only in a "carefully drawn order that limits speech as little as possible" and that is based on a "clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties." Gulf Oil Co. v. Bernard, 452 U.S. 89, 100 & n.12, 101, 102 (1981). No precedent exists for an order requiring a defendant to give class members notice of the district court's preliminary unfavorable assessment of the "evidence" introduced in the case, with the stated purpose of influencing the primary conduct of class members.

Taken in context, the July 12 order is even more difficult to fathom. The order is expressly linked to the massive accounting required under the reissued structural injunction. As the opinion makes clear, the court issued the July 12 order to discourage class members from acting upon any trust-related information until after the court-ordered accounting is complete. See, e.g., Op. 20 ("The court-ordered accounting is designed to promote class members' rights to make fully informed choices about their trust assets. If there are no more informed decisions to be made, or if all the trust assets are gone, then the court-ordered accounting will be useless to the Indians."). Indeed, the court regarded the July 12 order as the practical alternative to an order "suspend[ing] all trust-related decision-making until this case concludes and Interior actually provides the required accounting," which, in the district court's view, would have been "the only way to fully safeguard" the right to

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[2] See Rule 23(d) ("In the conduct of a [class action], the court may make appropriate orders: ... (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and prevent claims or defenses, or otherwise to come into the action; [or] ... (5) dealing with similar procedural matters.") (emphasis added).

the court-ordered accounting. Id. at 20 n.8; see also id. at 18 ("the trust beneficiaries should retain all or most of their assets in as unaltered a state as is practicable, until Interior completes the required accounting") (quotation marks omitted).

As our structural injunction briefs explain, however, the accounting ordered by the district court should never be implemented. The district court could not properly order Interior to spend billions of dollars on an endeavor that Congress never authorized, much less required. Even plaintiffs do not suggest that the injunction will be implemented. Their primary argument on appeal is that the case should be remanded to the district court because the injunction is "impossible" to implement. Pl. Br. 6, 7-12.[3]

The scope of the July 12 order is directly linked to the particulars of the structural injunction. For example, the July 12 order, which applies to all written communications "without regard to subject matter," Op. 22, is intended to discourage any transactions in trust land. Indeed, the July 12 order is an expansion of a September 2004 order requiring that notice of the pendency of the litigation be included in communications concerning land sales. See Op. 12-14, 18; Cobell v. Norton, 225 F.R.D. 41, 53-54 (D.D.C. 2004); Cobell v. Norton, 224 F.R.D. 266, 288-89 (D.D.C. 2004). But as our structural injunction briefs explain, the district court had no basis for requiring Interior to describe and verify transactions in trust land. That requirement disregards the plain terms of the 1994 Act – which requires Interior to account for the balance of funds in IIM accounts – as well as this Court's recognition that "funds have quite a different legal status from the allotment land itself." 392 F.3d at 464. Plainly, Congress did not expect Interior to reconstruct the entire process of "fractionation" of land that has yielded over the past century land ownership interests recorded to the 42nd decimal point. See H.R. Rep. No. 102-499, at 28 (1992).

[3] Plaintiffs would have the district court order the government to pay billions of dollars as a substitute for the court-ordered accounting, a "remedy" that, as our briefs explain, is obviously impermissible.

Likewise, the July 12 order applies to all written communications with any current or former IIM account holder. But as our structural injunction briefs also explain, the district court had no basis for ordering Interior to produce account statements for accounts that were closed before the enactment of the 1994 Act. Closed accounts have no balance, and Congress's clear premise in enacting the 1994 Act was that the account statements would be produced for the roughly 300,000 open accounts. See, e.g., H.R. Rep. No. 102-499, at 26.

The structural injunction has been stayed and oral argument is imminent. The July 12 order would be remarkable under any circumstances, but its timing is particularly difficult to comprehend. A stay that preserves the status quo should be entered pending oral argument on the structural injunction appeal and further order of this Court. In light of the oral argument, the Court can determine whether full briefing on the July 12 order would be useful.

II. A Stay That Preserves The Status Quo Will Not Harm The Class And Will Prevent Class Members From Receiving The Inherently Misleading Notice Required By The District Court.

There can be no serious contention that a stay of the July 12 order would harm the class. As just explained, plaintiffs do not suggest that the accounting ordered by the district court will ever be implemented. Thus, they could not plausibly contend that the class should be warned to avoid trust-related transactions pending the completion of that accounting.

Nor could plaintiffs identify any other pressing need for a class-wide notice. Plaintiffs' motion for a class-wide notice was filed in October 2004, eight years into the litigation. The motion did not cite any development in the litigation as its impetus. Nor did the district court, in granting the motion eight months later, identify any impetus for the July 12 order other than the fact that plaintiffs had filed a motion. Although there were significant developments in the litigation in that eight-month interval – this Court vacated the original structural injunction and stayed the reissued injunction – the district court, for obvious reasons, did not suggest that those developments provided a basis for a notice warning the class that all of Interior's trust-related information is of "questionable

reliability." Since there was no particular impetus for the July 12 order, there can be no plausible objection to a stay.

By contrast, a stay is necessary to prevent hundreds of thousands of trust beneficiaries from receiving the inherently misleading notice ordered by the district court. The harm produced by such notices cannot in any meaningful sense be undone. A notice declaring that "any" trust-related information "may be unreliable" is hardly calculated to produce informed decision-making. The result would be to undermine the ongoing relationship between the Interior Department and hundreds of thousands of individual Indians, not only with respect to their IIM accounts, but in their day-to-day relationship on a wide variety of subjects for which Interior furnishes essential services. The suggestion in the opinion that trust beneficiaries can anticipate significant monetary payments as a result of this litigation (e.g., Op. 23 n.10) is particularly misleading and creates expectations that are entirely unwarranted.[4]

The court had no authority to compel Interior to impugn the integrity of the information that it supplies to trust beneficiaries based on the court's casual assessment of unidentified "evidence" that is not embodied in a judgment of any kind. Indeed, the July 12 order would prejudge the outcome of the accounting enterprise itself, by declaring in advance that Interior's trust records are inadequate to produce reliable account statements. The order disregards the limitations on the judicial role underscored by this Court in vacating the original structural injunction. See 392 F.3d at 472, 475 (discussing 5 U.S.C. 706(1)).

The episodes cited by the district court in its "Factual History" of this nine-year litigation do not, even on their face, reveal anything about the present state of Interior's trust information. For example, the court notes its 2002 decision holding Secretary Norton in contempt. Op. 7. But that decision had nothing to do with the accuracy of trust records, and it was vacated by this Court.

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[4] Although the district court asserts that "[m]any class members depend on the IIM trust as their primary (or sole) source of income," Op. 23 n.10, the record shows that the overwhelming majority of land-based accounts – about 96% – receive annual leasing income of less than $250. See 2003 Cason Decl. at 2 (Docket #2367).

Likewise, the district court cites its 2002 referral of government counsel to the Committee on Grievances. The referral was based on the district court's belief that sending completed account statements to class members constituted impermissible contacts with represented parties. It had nothing to do with the accuracy of trust information. Moreover, the Committee determined that no action was warranted. See Op. 7-8.

The district court's charges of "retaliation" are particularly obscure. The court refers to the allegation of Mona Infield, a Bureau of Indian Affairs employee who in 2000 charged that her entire office was being moved from Albuquerque, New Mexico to Reston, Virginia, in retaliation for affidavits she had submitted in the case. Op. 8. The charge was contested, see Docket #684, and the dispute was settled when Ms. Infield was allowed to continue working out of the Albuquerque office. See Op. 9. None of these events reflects upon the accuracy of trust information.

Equally unfounded is the district court's assertion that Interior responded to the September 2004 order restricting communications about land transactions by withholding checks from trust beneficiaries. Op. 10. As Interior's uncontradicted affidavits made clear, the two complaining beneficiaries had received their checks in the ordinary course. See Docket #2845; Cobell v. Norton, 355 F. Supp. 2d 531, 531-36 (D.D.C. 2005). The district court nevertheless declared that it would treat plaintiffs' allegations of retaliation as "conceded" unless Secretary Norton personally appeared in court and testified regarding her allegedly retaliatory intentions. 355 F. Supp. 2d at 543. The Secretary declined to do so, noting that the government's affidavits wholly rebutted the assertions of retaliation. See Docket #2845.[5]

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[5] The district court found the government's affidavits wanting because they did not refute the allegation that, in the first week of October 2004, certain Interior employees refused to discuss trust-related information with Indians. As the government explained, the employees were responding directly to the district court's September 29, 2004 order that, in very broad terms, restricted Interior's communications with class members. See Docket #2708, at 3 (second full paragraph prohibited all communications with members of the plaintiff class in the absence of a court-approved notice). The district court dismissed this explanation as pretext for willful retaliation, declaring that it was "offended that the individuals responsible for these acts would cite the Court's Orders as justification" for their acts of "utter depravity and moral turpitude." 355 F. Supp. 2d at 541.

The district court states that "Interior cannot even determine which IIM account holders are members of the plaintiff class." Op. 5. But as the order cited by the court makes clear, the reference is to the wholly unremarkable fact that Interior could not immediately identify for the court all of the class members who simultaneously possessed two different types of IIM accounts (accounts opened before 1997, when the class was certified, and accounts opened after that date). See May 28, 2004 Mem. & Order, at 2-3 (Docket #2587).

To the extent that the district court discusses trust records at all, it is to reiterate the old and untested accusations of former Special Master Balaran, who resigned three days before this Court was to hear oral argument on the government's mandamus petition to disqualify him for bias. See No. 03-5288. The observation that in amassing and storing 300-500 million pages of paper records in multiple storage facilities throughout the country, Interior would occasionally encounter roof leaks, mouse droppings, and mold, is unsurprising. Nor would such incidents furnish any basis for a sweeping determination about the reliability of each one of several hundred thousand individual accounts.

Mr. Balaran's various accusations of intentional misconduct could scarcely be treated as "evidence" of any sort, much less as evidence that all trust-related information supplied by Interior is of "questionable reliability." Like Master-Monitor Kieffer, Mr. Balaran assumed a "quasi-inquisitorial, quasi-prosecutorial role that is unknown to our adversarial legal system." 334 F.3d at 1142. See, e.g., Site Visit Report of the Special Master to the Dallas, Texas Office of the Minerals Revenue Management Division of the Department of the Interior's Minerals Management Service (Sept. 29, 2003), at 1 (Docket #2311) (asserting "the authority of institutional reform special masters to uncover facts and collect evidence via ex parte contacts with parties and counsel") (quotation marks omitted); Interim Report of the Special Master Regarding the Filing of Interior's Eighth Quarterly Report, at 1 n.1 (April 21, 2003) (Docket #1999) (explaining that report was based on information "obtained outside of normal channels and to which the parties may have no familiarity"). The government sought Mr. Balaran's disqualification after learning from his billing records that he

had secretly hired a complaining witness (and former officer of an interested corporation involved in a contract dispute) to assist him in his investigation of that witness's own charges of government misconduct. This Court recently ordered full briefing on the mandamus petition, which was held in abeyance after Mr. Balaran's resignation, and set oral argument for October 14, 2005. See No. 03-5288.

With respect to electronic records, although the district court notes the ongoing evidentiary proceeding on plaintiffs' charge that Interior's electronic data is "at risk of corruption," Op. 7, the court does not suggest that that proceeding (now in its 57th day of testimony and set to conclude on Friday of this week) could provide a basis for the July 12 order. This Court vacated the district court's earlier injunction requiring Interior to disconnect its computer systems from the Internet, explaining (among other things) that the court had not held any evidentiary hearing. See Cobell v. Norton, 391 F.3d 251, 261-62 (D.C. Cir. 2004).

The district court's assertion that Interior "concedes" the "inherent unreliability" of all of its trust-related information (Op. 21) is inexplicable. The district court's "evidence" of the "questionable reliability" of Interior's trust-related information is thus reduced to a set of rhetorical questions: "If Interior cannot even ascertain the number of existing IIM account holders, how can any of its more complicated calculations, such as land appraisals, be trusted? If Interior is willing to deceive this Court, why would anyone think that Interior would hesitate to lie to the Indians?" Ibid.

As we have shown here and in our structural injunction briefs, the assertions have no factual predicate. Indeed, to the extent that there is evidence touching upon the reliability of Interior's trust information, it suggests that the account balances and underlying transaction histories are more accurate, and the agency records more comprehensive, than some had believed at the time of this Court's original decision. In a study performed pursuant to a special $20 million appropriation, Ernst & Young examined the accounts of the named plaintiffs and their agreed-upon predecessors (a total of 25 persons and 37 IIM accounts). Ernst & Young analyzed 12,617 transactions in the

period from 1914 to 2000, finding contemporaneous evidence of 86% of the transactions representing 93% of the total dollar amount. Expert Report of Joseph R. Rosenbaum at 2, 5 (3/28/03) (Phase 1.5 Tr., Def. Ex. 156). With a single exception, Ernst & Young found "no evidence of transactions that were not recorded in the available IIM account ledgers." Id. at 2. The one exception was a credit of $60.94 that was incorrectly credited to an account with a similar account number. See ibid. Plaintiffs' three-day examination of the report's author during the Phase 1.5 trial produced no evidence to the contrary. See Tr., June 9-11, 2003; see also Pl. Ex. 36 (Plaintiffs' Expert Report (Rebuttal)). Since that time, Interior has continued to proceed with reconciling tens of thousands of accounts involving tens of millions of dollars.

III. The July 12 Order Is Subject To Immediate Appeal.

The July 12 order is subject to immediate appeal. First, it is an injunction and thus appealable under 28 U.S.C. 1292(a). See Avery v. Sec'y of Health and Human Services, 762 F.2d 158, 160-61 (1st Cir. 1985) (Breyer, J.). The order "compel[s] affirmative agency conduct," imposes a significant "burden on the Secretary," and is "enforceable by contempt sanctions." Id. at 160 (citing 16 C. Wright, A. Miller, E. Cooper & E. Gressman, Federal Practice and Procedure: Jurisdiction § 3922 (1977)). On its face, it is "not purely 'a matter of [litigation] procedure'" but reflects a substantive determination and orders substantive relief. See id. at 160-61. By the district court' s own admission, the order is designed to address primary conduct concerning how money is spent.

The harm, as should be clear, could not be undone on appeal from final judgment, see id. at 161, which the district court does not intend to issue at any point in the foreseeable future. See 2/23/05 Mem. Op. 14 (retaining jurisdiction until March 27, 2011); 226 F. Supp. 2d at 161 (suggesting that the litigation will require the full extent of the district court's life tenure). Meanwhile, the July 12 order would poison the relationship between Interior and the trust beneficiaries that it is charged with serving, with the stated goal of dissuading trust beneficiaries from engaging in any trust-related transactions for the indefinite future. "In sum, both as a matter

of form and in terms of the purposes of section 1292(a)," it is "proper in the context of this litigation to treat the 'notice' ... order[] as injunctive relief that is appealable on an interlocutory basis." Avery, 762 F.2d at 161 (citing Wright & Miller, §§ 3920-24); see also Great Rivers Cooperative v. Farmland Industries, Inc., 59 F.3d 764, 766 (8th Cir. 1995) (order directing the defendant cooperative to print in its newsletter a statement from the plaintiff members regarding the litigation was an appealable injunction).

Second, the July 12 order is a final order subject to immediate review under the collateral order doctrine. See, e.g., Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 171-77 (1974) (holding that an order allocating 90% of the costs of a class notice to the defendants was appealable under the collateral order doctrine and proceeding to review the notice requirement on the merits); In re School Asbestos Litig., 842 F.2d 671, 677-79 (3d Cir. 1988) (order requiring an association of asbestos manufacturers to disclose in communications with class members its relationship to the defendants was reviewable under the collateral order doctrine).

If the Court nonetheless has doubts about its appellate jurisdiction, we respectfully ask that the Court treat the appeal and motion for stay as a petition for writ of mandamus. See Cobell, 334 F.3d at 1140 n.* (citing Ukiah Adventist Hosp. v. FTC, 981 F.2d 543, 548 n.6 (D.C. Cir. 1992)).

CONCLUSION

The district court's July 12, 2005 order should be stayed pending the September 16, 2005 oral argument on the structural injunction appeal and further order of this Court.

Respectfully submitted,

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