[NOT YET SCHEDULED FOR ORAL ARGUMENT]

No. 05-5269

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

BRIEF FOR THE APPELLANTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), undersigned counsel certifies as follows:

A. Parties and Amici:

The named plaintiffs-appellees in this class 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 accounts, excluding those who had filed their own actions prior to the filing of the complaint in this case.

The defendants-appellants are Gale A. Norton, as Secretary of the Interior; the Assistant Secretary of Interior-Indian Affairs; and John W. Snow, as Secretary of Treasury.

B. Rulings Under Review:

Appellants seek review of the opinion and order issued on July 12, 2005 by Judge Royce C. Lamberth, United States District Court for the District of Columbia, in Civ. No. 96-1285 (RCL). The opinion and order are published at 229 F.R.D. 5.

C. Related Cases:

This Court has issued six decisions in appeals arising out of this litigation. See Cobell v. Norton, No. 05-5068, 2005 WL 3041512 (D.C. Cir. Nov. 15, 2005); Cobell v. Norton, 392 F.3d 461 (D.C. Cir. 2004); Cobell v. Norton, 391 F.3d 251 (D.C. Cir. 2004); In re Brooks, 383 F.3d 1036 (D.C. Cir. 2004); Cobell v. Norton, 334 F.3d 1128 (D.C. Cir. 2003); and Cobell v. Norton, 240 F.3d 1081 (D.C. Cir. 2001). In addition to the instant appeal,

two additional appeals are currently pending. See In re Norton, No. 03-5388 (oral argument heard October 14, 2005); Cobell v. Norton, No. 05-5388 (notice of appeal filed October 21, 2005).

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GLOSSARY

1994 Act	American Indian Trust Fund Management Reform Act, Pub. L. No. 103-412, 108 Stat. 4239
APA	Administrative Procedure Act
IIM Accounts	Individual Indian Money Accounts
IITD	Individual Indian Trust Data
NAID	Native American Industrial Distributors, Inc.

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BRIEF FOR THE APPELLANTS

STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. §§ 1331 and 1361, inter alia. On July 12, 2005, the district court issued an order requiring the Secretary of the Interior to include, in all of the Department's written communications with class members, a notice warning class members of the "questionable reliability" of any trust-related information that they receive from Interior. The government filed a timely notice of appeal on July 25, 2005. On September 9, 2005, this Court granted a stay of the July 12 order pending appeal. The government invokes this Court's jurisdiction under 28 U.S.C. § 1292(a), and, in the alternative, under 28 U.S.C. §§ 1291 and 1651. See pp. 44-47, infra. Plaintiffs contest this Court's jurisdiction.

STATEMENT OF THE ISSUES

1. Whether this Court should vacate the order directing the Secretary of the Interior to include in all written communications with class members a notice declaring that "[e]vidence introduced" in this litigation shows that Interior's trust-related information "may be unreliable" and warning class members to take into account the "questionable reliability" of Interior's trust-related information before taking action on such information.

2. Whether this Court should direct that this case be assigned to a different district court judge.

STATEMENT OF THE CASE

A. The American Indian Trust Fund Management Reform Act, enacted in 1994, requires the Secretary of the Interior to "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" a 1938 statute dealing with investment of trust monies. Pub. L. No. 103-412, § 102(a), 108 Stat. 4239. In 2001, this Court largely affirmed a declaratory judgment in favor of the plaintiff class of individual Indian account holders, concluding that the performance of accounting activities had been unreasonably delayed within the meaning of 5 U.S.C. § 706(1). This Court approved a remand to the agency to conduct an accounting. Cobell v. Norton, 240 F.3d 1081, 1107-09 (D.C. Cir. 2001).

Since that time, the district court has conducted three extended trials. None has evaluated the reliability of trust account data. Only the first trial, conducted in 2002, which held the Secretary of the Interior in contempt, considered progress made in accounting activities. This Court vacated the contempt ruling and expressly rejected the conclusion that the Secretary had failed to initiate accounting activities or had committed a fraud on the court. Cobell v. Norton, 334 F.3d 1128, 1145-50 (D.C. Cir. 2003).

This Court subsequently reversed a "structural injunction" that established comprehensive judicial oversight of accounting and other trust activities, and that was estimated to cost between $6 and $12 billion to implement. Cobell v. Norton, 392 F.3d 461 (D.C. Cir. 2004). This Court also reversed an injunction requiring Interior to disconnect computers from Internet access. Cobell v. Norton, 391 F.3d 251 (D.C. Cir. 2004).

In February 2005, the district court reissued the vacated portions of the accounting structural injunction verbatim. On November 15, 2005, this Court vacated that injunction. Cobell v. Norton, No. 05-5068, 2005 WL 3041512 (D.C. Cir. Nov. 15, 2005).

In October 2005, the district court issued an order requiring disconnection of computers from access to the Internet and from access to other Interior computers and third parties. That order has been administratively stayed by this Court (No. 05-5388).

B. The present appeal arises from the order issued on July 12, 2005, prompted by plaintiffs' "Motion to Require Defendants to Give their Beneficiaries Notice of their Continuing Inability or Refusal to Discharge their Fiduciary Duties." JA __ [Docket #2746].

The July 12 opinion decries the very existence of the present Department of the Interior, characterizing it 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 had left behind." Cobell v. Norton, 229 F.R.D. 5, 7 (D.D.C. 2005). It accuses the Department of "vindictiveness" and "dishonesty," id. at 9, "Machiavellian guile," id. at 10, and "Byzantine maneuvering," id. at 11, all of which form part of a "degenerate tenure as Trustee-Delegate for the Indian trust," which has featured "scandals, deception, dirty tricks and outright villainy - the end of which is nowhere in sight," id. at 11. The central point, the court stressed, is "the raw, shocking, humiliating truth at the bottom: After all these years, our government still treats Native American Indians as if they were somehow less than deserving of the respect that should be afforded to everyone in a society where all people are supposed to be equal." Id. at 7.

The July 12 order requires Interior to state, in all written communications to any current or former IIM account holder

"without regard to subject matter," id. at 17 (emphasis added), that

> 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.

Id. at 24. The stated purpose of the notice is to discourage trust beneficiaries from taking action based on any trust-related information supplied by Interior until after the "accounting" ordered by the court in the reissued structural injunction is complete. Id. at 15-16.

The government appealed from this order, which was stayed by this Court. Following issuance of the order, the government also moved for the case to be assigned to a different district court judge. The motion was filed in No. 05-5068, the appeal from the reissued structural injunction, which was scheduled for argument on September 16, 2005. Plaintiffs urged that the motion should be heard as part of this appeal, and the panel in 05-5068 transferred the motion to this panel.

STATEMENT OF FACTS

A. Background.

The Department of the Interior administers roughly 260,000 Individual Indian Money trust accounts with balances totaling approximately $400 million. In 1994, Congress enacted the American Indian Trust Fund Management Reform Act, Pub. L. No.

103-412, 108 Stat. 4239, which requires the Secretary of the Interior to "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" a 1938 statute dealing with investment of trust monies.

In hearings preceding the 1994 Act, Congress found various problems in the administration of the IIM accounts. See H.R. Rep. No. 102-499, at 10 (1992). However, Congress also noted the formidable difficulty in managing tiny ownership interests that Interior records to the 42nd decimal point. Id. at 28 & n.94. Congress also noted estimates that it might cost $281 million to $390 million to audit accounts, and stressed that "[o]bviously, it makes little sense to spend so much when there was only $440 million deposited in the IIM trust fund for account holders as of September 30, 1991." Ibid.

In 1996, a class of present and former IIM account holders filed this lawsuit, claiming, among other things, that the government had failed to provide a timely, adequate accounting.

In 1999, the district court issued a declaratory judgment holding that Interior has an enforceable duty to account for the balances in the IIM accounts. Cobell v. Babbitt, 91 F. Supp. 2d 1, 28-31, 56 (D.D.C. 1999).

The government took the first of what were to be several appeals. To date, the Court has heard argument in seven appeals, and three additional appeals, including this one, are pending.

B. Appeals Initiated Before 2005.

1. This Court's Initial 2001 Decision.

The Court's 2001 decision largely affirmed the declaratory judgment, concluding that the agency had unreasonably delayed performance of accounting activities within the meaning of 5 U.S.C. § 706(1). Cobell v. Norton, 240 F.3d 1081, 1108 (D.C. Cir. 2001).

This Court noted, however, that the district court had properly remanded the matter to Interior, leaving to the agency the choice of how the accounting activities would be conducted. Id. at 1104, 1109. The Court upheld the use of periodic reporting requirements to monitor Interior's progress, id. at 1109, but admonished the district court "to be mindful of the limits of its jurisdiction," id. at 1110.

2. This Court's 2003 Decision Regarding Contempt And The Special Master-Monitor.

The remand to the agency envisioned by this Court's decision was short-lived. By the end of 2001, following receipt of reports from Special-Master Monitor Joseph Kieffer, the district court had initiated contempt proceedings charging that Interior had failed to initiate an historical accounting and had included inaccurate statements in its quarterly reports to the court. The ensuing contempt trial consumed 29 days, including the personal testimony of Secretary Norton.

In the contempt ruling, the district court declared that "Secretary Norton and Assistant Secretary McCaleb can now rightfully take their place . . . in the pantheon of unfit

trustee-delegates." Cobell v. Norton, 226 F. Supp. 2d 1, 161 (D.D.C. 2002). The court announced that, henceforth, it would direct the conduct of the accounting as well as virtually all other trust activities. The court thus ordered the parties to submit plans for an accounting, as well as plans 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 an accompanying opinion, the district court denied the government's motion seeking the removal of Mr. Kieffer. Cobell v. Norton, 226 F. Supp. 2d 163 (D.D.C. 2002).

In Cobell v. Norton, 334 F.3d 1128 (D.C. Cir. 2003), this Court vacated the contempt citations and also vacated Mr. Kieffer's appointment. This Court explained that the "uncontested facts" were inconsistent with the charge that the Secretary had failed to initiate historical accounting activities. Id. at 1148. To the contrary, the record demonstrated that "in her first six months in office Secretary Norton took significant steps toward completing an accounting." Id. at 1148. Indeed, even the Special Master-Monitor had recognized that Interior had "'made more progress . . . in six months [July through December 2001] than the past administration did in six years.'" Ibid (citations omitted). 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. See also 2005 WL 3041512, at *2

("On appeal from the contempt citations, we overturned each of the five separate specifications articulated by the district court for charging the individuals with contempt.").

In vacating the appointment of Special Master-Monitor Kieffer, whose reports had prompted the contempt proceedings, 334 F.3d at 1135, this Court explained that the district court had improperly "charged [Mr. Kieffer] with an investigative, quasi-inquisitorial, quasi-prosecutorial role that is unknown to our adversarial legal system." Id. at 1142.

3. This Court's 2004 Structural Injunction Decision.

The contempt trial had formed the predicate for the district court's assumption of authority and its justification for issuing structural relief. However, this Court's decision vacating the contempt ruling did not cause the district court to reconsider its action. "In spite of [this Court's] decision reversing the district court's contempt citations, the court made clear that it considered its findings of facts undisturbed." 2005 WL 3041512, at *2. "Without making any additional findings of fact on the need for broader injunctive relief, it initiated another bench trial to evaluate the parties' competing plans for bringing the defendants into compliance with their fiduciary obligations." Ibid.

This "Phase 1.5" trial consumed 44 days. The trial was not intended to determine whether structural relief should issue; that determination had already been made in the contempt

decision. The purpose of the Phase 1.5 trial was to determine the content of the structural relief.

The detailed structural injunction that issued in September 2003 consisted of two general parts. Cobell v. Norton, 283 F. Supp. 2d 66 (D.D.C. 2003). The first part dealt with what the district court described as an historical accounting. The second addressed the implementation of a broad program of trust reform.

The "accounting" envisioned by the structural injunction departed dramatically from Interior's understanding of this Court's mandate. The Interior Plan for an Historical Accounting provided for an accounting of "funds [in IIM accounts] which are deposited or invested pursuant to the Act of June 24, 1938 (25 U.S.C. 162a)." Pub. L. No. 103-412, § 102(a). This Court, in declaring its view of the accounting requirement in its 2001 decision, explained that the requirement to account for "'all funds' 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)." 240 F.3d at 1102.

The structural injunction fundamentally reshaped the accounting to include, among other things, review of other assets and the re-creation of all land transactions since 1887. 283 F. Supp. 2d at 175-77. It also "required coverage of the accounts of deceased beneficiaries and accounting for transactions prior to 1938, and it completely precluded the use of statistical sampling." 2005 WL 3041512, at *2. "The resulting modifications

of Interior's plan evidently caused the cost of complying with the injunction to rise by more than an order of magnitude, from $335 million over five years to more than $10 billion." Id. at *6.

Because the magnitude of the costs associated with the accounting injunction was estimated at the time to be between $6 and $12 billion, Congress, as part of the FY 2004 Interior appropriation, Pub. L. No. 108-108, amended the law to provide that neither the 1994 Act nor any provision of common law required the performance of an historical accounting. See 2005 WL 3041512 at *3; H.R. Conf. Rep. 108-330, at 117-18 (2003). Individual senators reported widespread agreement that "we should not spend this kind of money on an incredibly cumbersome accounting that will do almost nothing to benefit the Indian people." 149 Cong. Rec. at S13,785 (2003) (Sen. Burns); see also id. at S13,786 (Sen. Dorgan) (describing court-ordered accounting as "nuts").

This Court granted a stay pending appeal and, in Cobell v. Norton, 392 F.3d 461 (D.C. Cir. 2004), vacated all aspects of the injunction with the exception of a single reporting requirement. In vacating the accounting portion of the injunction in its entirety, this Court confirmed that Pub. L. No. 108-108 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." Id. at 466 (noting congressional concern with the "disparity between the costs of the judicially

ordered accounting, and the value of the funds to be accounted for").

In vacating the non-accounting portion (save for a single filing requirement), this Court made clear that the fiduciary nature of the duties at issue does not vitiate the normal structure of judicial review of agency action. Id. at 471-78. This Court stressed 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, 542 U.S. 55, 64 (2004)). As this Court explained, 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.'" Id. at 472 (quoting Southern Utah, 542 U.S. at 66).

4. Mandamus Petitions Seeking Disqualification Of Special Master Balaran and The District Court Judge.

At the time that it issued its 2002 contempt ruling, the district court also referred to Special Master Alan Balaran claims that 37 individuals - current and former Interior and Justice Department officials - should be held in contempt for defrauding the court and violating court orders. In 2003, several of these individuals sought a writ of mandamus compelling the recusal of Mr. Balaran and the district court judge. This Court granted the petition with respect to Mr. Balaran's involvement in the contempt proceeding because of his extensive

ex parte contacts with the parties and witnesses. In re Brooks, 383 F.3d 1036, 1044-46 (D.C. Cir. 2004). This Court denied the petition with respect to the district court judge, accepting the district court's explanation that its conversations with Mr. Balaran and with Mr. Kieffer had not given it knowledge of disputed evidentiary facts. Id. at 1043.

In 2003, for separate reasons, the government sought Mr. Balaran's recusal from all future proceedings. See No. 03-5288. The government's petition was prompted by Mr. Balaran's handling of an investigation, referred to him by the district court, into charges that the government had fraudulently concealed information from the court. The investigation was triggered by the allegations of a government contractor, Native American Industrial Distributors, Inc. ("NAID"), which was engaged in a contract dispute with Interior. Unbeknownst to the government, Mr. Balaran hired NAID's vice president to collect and analyze evidence of NAID's charges.[1] The resulting "Interim Report" was released two days before oral argument in this Court on the appeal of the 2002 contempt order. It stated that Interior had conspired with NAID's competitor to "conceal adverse information that undoubtedly would have been introduced in the contempt trial[.]" JA __, __. [Mandamus JA 137, 138]. Plaintiffs immediately filed the Interim Report with this Court

[1] It is not entirely clear whether the NAID executive resigned from his position during the period of his employment by Mr. Balaran, but he was again a NAID vice president after his work with Mr. Balaran concluded.

on the eve of oral argument on the contempt appeal as evidence of the government's "contumacious" conduct. [Mandamus JA 219-20].

In denying the motion to disqualify Special Master Balaran, the district court declared that the government's "charges of impropriety" were "misdirected" and "more properly should have been leveled at" Interior's own conduct. Cobell v. Norton, 310 F. Supp. 2d 102, 117 (D.D.C. 2004). Nevertheless, on April 5, 2004, three days before this Court was originally scheduled to hear oral argument on the government's mandamus petition, Mr. Balaran submitted his resignation, declaring that he had been on the verge of uncovering evidence that Interior was systematically "putting the interests of private energy companies ahead of the interests of individual Indian beneficiaries." JA __ [Mandamus JA 89].

The original argument in this Court was stayed. After further briefing, this Court heard oral argument on the matter on October 14, 2005.

5. This Court's 2004 Internet Disconnection Decision.

In November 2001, at approximately the same time that the contempt proceedings were initiated, Special Master Balaran issued a report identifying flaws in Interior's computer security that the Master believed could detrimentally affect the integrity of Individual Indian Trust Data ("IITD"). See Cobell v. Norton, No. 96-1285, 2005 WL 2665629, at *1 (D.D.C. Oct. 20, 2005). Following the issuance of the Master's report, the district court on December 5, 2001 entered a temporary restraining order that

required Interior to disconnect from the Internet all information technology ("IT") systems housing IITD. Id. at *2.

To obtain reconnection, Interior agreed to a Consent Order, issued on December 17, 2001, by which it agreed to a procedure for restoring Internet connections. Ibid. The Consent Order provided that offices would be restored to the Internet upon agreement by the Master that the systems were secure or that they provided no access to IITD. Ibid. Ultimately, most systems taken off-line were restored. Id. at *3.

In July 2003, the district court entered a preliminary injunction by which the court, rather than the Special Master, assumed full authority over Internet access. Cobell v. Norton, 274 F. Supp. 2d 111 (D.D.C. 2003). On March 15, 2004, the district court issued a preliminary injunction requiring Interior immediately to disconnect all IT systems from the Internet, with limited exceptions.

This Court first stayed and, in December 2004, vacated the injunction. Cobell v. Norton, 391 F.3d 251 (D.C. Cir. 2004). Noting that "there was no evidence that anyone other than the Special Master's contractor had 'hacked' into any Interior computer system housing or accessing IITD," id. at 259, this Court remanded for further proceedings, id. at 262.

C. Proceedings in 2005.

1. Reissuance of the Structural Injunction.

As discussed above, Congress responded to the original structural injunction with Pub. L. No. 108-108, appropriations

legislation that removed the legal basis for the accounting portion of the injunction. In vacating that portion of the injunction, this Court explained that Pub. L. No. 108-108 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 "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.

In February 2005, after the expiration of Pub. L. No. 108-108, the district court reissued the accounting portion of the original structural injunction, without any modifications. Cobell v. Norton, 357 F. Supp. 2d 298 (D.D.C. 2005). The district court acted sua sponte, without holding a hearing or soliciting briefs. See 2005 WL 3041512, at *6. The court dismissed Pub. L. No. 108-108 as "a bizarre and futile attempt at legislating a settlement of this case," 357 F. Supp. 2d at 306, and dismissed this Court's decision vacating the prior structural injunction as "not relevant for the present purpose," id. at 300. The court incorporated by reference its previous structural injunction opinion, see id. at 300 & n.1, and announced that it would retain jurisdiction over the case until March 27, 2011, see id. at 306.

This Court initially stayed and, on November 15, 2005, vacated the accounting injunction. Cobell v. Norton, No. 05-

5068, 2005 WL 3041512 (D.C. Cir. Nov. 15, 2005). The Court concluded that "reissuance of the injunction was not properly grounded in either fact or law." Id. at *6.

With regard to the law, this Court confirmed that the district court "owed substantial deference to Interior's plan" for historical accounting activities. Id. at *5. This Court explained that "the choices at issue required both subject-matter expertise and judgment about the allocation of scarce resources, classic reasons for deference to administrators." Ibid. The district court, however, had improperly "invoked the common law of trusts and quite bluntly treated the character of the accounting as its domain." Ibid. It had "thus erroneously displaced Interior as the actor with primary responsibility for 'work[ing] out compliance with the broad statutory mandate.'" Ibid. (quoting Southern Utah, 542 U.S. at 66-67).

With regard to the facts, this Court held that the injunction was not "grounded in specific findings that Interior breached its statutory trust duties." Id. at *5. The district court had "explicitly relied on its earlier contempt findings to justify a remedy more intensive than its initial remand to the defendants ... even though this court had in the meantime ruled that the record was inadequate to support the contempt citations." Ibid. This Court explained that "[f]or the district court to rely on the old record in the face of our previous decision and of subsequent developments was error." Id. at *6. This Court observed that its contempt decision had relied in part

on the district court's "disregard of Interior's affirmative accomplishments on Norton's watch," id. at *5, and on "the apparently uncontradicted truth of certain statements Norton made regarding efforts to improve computer security (which the district court had mistakenly thought contradicted)," ibid. "Further, even if the prior findings had been fully valid and had supported issuance of the injunction in September 2003, they would not necessarily have supported its reissuance 17 months later in February 2005," in light of the status reports that the defendants submitted during that period "documenting their progress in completing the historical accounting and otherwise fulfilling their fiduciary duties." Ibid.

2. The 2005 Computer Disconnection Injunction.

On October 20, 2005, following a trial that consumed 59 days, the district court issued an injunction that required Interior to disconnect a broad array of computers and computer systems not only from the Internet, but also from Interior's internal "intranet" connections; from all other Department computers, networks, or electronic devices; and from any computers or computer networks operated by contractors, Indian Tribes, or other third parties. Cobell v. Norton, No. 96-1285, 2005 WL 2665629, at *111 (D.D.C. Oct. 20, 2005).

The October 20 order required that disconnection occur "forthwith." On October 21, 2005, this Court granted the government's motion for an administrative stay to allow the Court

to receive the government's full stay papers, which are now pending with the Court. See No. 05-5388.

D. The Present Appeal.

1. The decision on review in this appeal was issued on July 12, 2005. Cobell v. Norton, 229 F.R.D. 5 (D.D.C. 2005). The decision was prompted by plaintiffs' "Motion to Require Defendants to Give their Beneficiaries Notice of their Continuing Inability or Refusal to Discharge their Fiduciary Duties." JA __ [Docket #2746]. That motion was filed in October 2004, eight years into the litigation. At the time the motion was filed, the district court's original structural injunction had been issued and had not yet been vacated.

Plaintiffs filed their motion shortly after the district court determined to intervene in all sales of trust lands. In so doing, the court explained that "individual Indians ... should not have to decide whether to sell their land without access to a full and accurate accounting, appraisal, and other relevant information," which would be made available by the accounting contemplated by its structural injunction. Cobell v. Norton, 225 F.R.D. 41, 52 (D.D.C. 2004). Pursuant to this ruling, Interior has included a notice in all written communications pertaining to land sales that informed class members of their right to consult with class counsel.

The motion regarding "Discharge [of] Fiduciary Duties" remained pending for more than eight months. In that period, 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.

2. The July 12 opinion is a broad moral condemnation of the Interior Department, its officers and employees. 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 had left behind." 229 F.R.D. at 7. The court decries Interior's record of "near wholesale abdication of its trust duties" and "unremitting neglect and mismanagement." Id. at 8. The court accuses Interior of turning its "wrath" on the Indian beneficiaries, id. at 10, and condemns what the court calls Interior's "degenerate tenure" as trustee, "a story shot through with bureaucratic blunders, flubs, goofs and foul-ups, and ... scandals, deception, dirty tricks and outright villainy - the end of which is nowhere in sight," id. at 11. The court labels Interior's performance as trustee "ghastly," id. at 7, and "ignominious," id. at 8. In decrying "the depths to which Interior has sunk," id. at 10, the court charges Interior with "vindictiveness" and "dishonesty," id. at 9, "Machiavellian guile," id. at 10, and "Byzantine maneuvering," id. at 11. And the court engages in an extended speculation as to whether the "present leaders" of the Department are "evil" or "apathetic" or "cowardly":

> Perhaps Interior's past and present leaders have been evil people, deriving their pleasure from inflicting

> harm on society's most vulnerable. Interior may be consistently populated with apathetic people who just cannot muster the necessary energy or emotion to avoid complicity in the Department's grossly negligent administration of the Indian trust. Or maybe Interior's officials are cowardly people who dodge their responsibilities out of a childish fear of the magnitude of effort involved in reforming a degenerate system.

Id. at 22.

Against the asserted "background of mismanagement, falsification, spite, and obstinate litigiousness," id. at 11, the district court declares that "all trust-related information Interior communicates to Indian beneficiaries is inherently unreliable," a point that the court treats as conceded, id. at 16.

3. The July 12 order requires Interior to include with all written communications to any current or former IIM account holder a notice stating:

> 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.

Id. at 24.

This notice must accompany all written communications "without regard to subject matter," id. at 17, 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," id. at 16. Thus, the notice must

accompany communications having nothing to do with the IIM accounts at issue here, such as information regarding health, education, and other welfare programs.

The express purpose of this notice is to discourage trust beneficiaries from disposing of any of their trust assets until after the "accounting" ordered by the court in the reissued structural injunction is complete. See id. at 14-16. The district court explained that "[t]he court-ordered accounting is designed to promote class members' rights to make fully informed choices about their trust assets." Id. at 16. 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 is practicable, until Interior completes the required accounting[.]" Id. at 14 (quotation marks omitted). The court announced that it "intends that trust beneficiaries remain, after this litigation is completed, in a position in which the accounting that Interior must generate will be in some meaningful sense beneficial." Id. at 15-16 (quotation marks omitted). The court declared that "the only way to fully safeguard this right 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." Id. at 16 n.8. Because such a course of action would be "impracticable," the court concluded that the notice required by the July 12 order would "have to suffice as an interim

measure." Ibid. The July 12 order remains in effect until the conclusion of the litigation. Id. at 23.

As sole authority for the order, the district court invoked Rule 23(d) of the Federal Rules of Civil Procedure, which authorizes a court in class action litigation to require that the class be given notice of procedural matters, such as the pendency of the litigation, the right to opt-out, or the proposed extent of the judgment. Id. at 12-16.

This Court issued a stay of the July 12 order pending appeal.

In addition to seeking the stay, the government also moved to have the entire case assigned to a different district court judge. The government filed the motion in its appeal from the reissued structural injunction, in which oral argument was already scheduled (No. 05-5068). Plaintiffs argued that the motion should be heard as part of this appeal instead, and the panel in No. 05-5068 transferred the motion to this panel.

SUMMARY OF ARGUMENT

I. The July 12 order excoriates Interior and its present officers and employees in terms that might seem injudicious if applied to the worst kind of reprobate. The opinion assails the "'modern' Interior department" as "the morally and culturally oblivious hand-me-down of a disgracefully racist and imperialist government that should have been buried a century ago," 229 F.R.D. at 7, and decries "Interior's degenerate tenure as Trustee-Delegate," id. at 11, a history "peppered with scandals, deception, dirty tricks and outright villainy – the end of which is nowhere in sight," ibid.

Based on this assessment, the district court required Interior to proclaim in all its written communications with Indian beneficiaries that any information they receive regarding the IIM Trust, IIM Trust lands, or other IIM Trust assets may be unreliable, and to advise them to take this unreliability into account in engaging in the sale of land or other trust assets. The express purpose of this notice is to discourage trust beneficiaries from disposing of their trust assets until after the "accounting" ordered by the court in the reissued structural injunction is complete. See id. at 14-16. The court declared that its ruling "represents a significant victory for the plaintiffs," and would make Indian beneficiaries aware of "the danger involved in placing any further confidence in the Department of the Interior." Id. at 23.

The sole source of authority identified by the court for its extraordinary order is Fed. R. Civ. P. 23(d). That provision is designed to convey neutral, accurate information to class members regarding procedural issues. In contrast, the court's order reflects a merits judgment designed to preserve what it believes to be the status quo by discouraging beneficiaries from undertaking transactions pending the completion of the accounting contemplated by the reissued structural injunction. It is, in relevant respects, the functional equivalent of an order requiring a defendant in a products liability class action to place a warning label on its products pending conclusion of the litigation. Such an order is plainly not authorized by Rule 23(d). The July 12 order is, in purpose and effect, an improper injunction ancillary to the broader structural injunction previously entered by the district court.

II. The issue at this juncture is not simply whether the district court's order should be reversed. When a district court's conduct of litigation threatens the appearance of justice and compels repeated intervention by this Court and Congress, it is appropriate that the case be assigned to a different district court judge. Since its contempt ruling in 2002, in which it declared Secretary Norton to be an "unfit" trustee, Interior officials have been the subject of an unshakeable moral condemnation that is impervious to guidance from this Court or to actions by Congress.

The district court's previous attacks on Interior and its officials, scathing as they were, proved merely a preamble for the July 12 decision. The gravity of the accusations put forward in that ruling cannot be overstated. The court explicitly declares that the government treats Indians as less than equal to other citizens: "[A]fter all these years, our government still treats Native American Indians as if they were somehow less than deserving of the respect that should be afforded to everyone in a society where all people are supposed to be equal." 229 F.R.D. at 7. The government is not guilty of mere ineptitude; it has actively turned against the people it is supposed to serve: "[T]his case serves as an appalling reminder of the evils that result when large numbers of the politically powerless are placed at the mercy of institutions engendered and controlled by the politically few" and reminds us "that the terrible power of government, and the frailty of the restraints on the exercise of that power, are never fully revealed until government turns against the people." Ibid. The district court's indictments are not restricted to past evils but are expressly directed as well at the "'modern' Interior Department," ibid., and its "present leaders," id. at 22.

The materials cited by the district court, even taken at face value, provide no shred of support for its declaration that Interior's officials and employees do not treat Indians as equal citizens and have turned "the terrible power of government" against them. It is unclear how or when, in the district court's

estimation, the conduct of present officers and employees of Interior came to form part of an unbroken continuum with past acts of "murder, dispossession, forced marches, assimilationist policy programs, and other incidents of cultural genocide." Id. at 7. What is clear is that the conviction has taken root. The appearance of justice cannot be preserved when the present officers and employees of Interior are subject to the continuing jurisdiction of a federal court that has judged them, wholly without basis, to be the morally oblivious heirs of a racist tradition who do not treat Indians as equal citizens.

The depth of the district court's misguided convictions doubtless explains to some measure why this Court has repeatedly been required to stay and reverse injunctions, disqualify special masters and even vacate a contempt judgment against a sitting cabinet secretary. Even if the district court had not violently condemned the present department and its leadership as racist and immoral, a pattern of this kind would counsel in favor of a new assignment. The district court's extraordinary moral indictment renders assignment to a new judge a necessity.

STANDARD OF REVIEW

An order under Fed. R. Civ. P. 23(d) is reviewed for abuse of discretion. Gulf Oil Co. v. Bernard, 452 U.S. 89, 100-01 (1981). The district court necessarily abuses its discretion when it commits an error of law. In re Sealed Case (Medical Records), 381 F.3d 1205, 1211 (D.C. Cir. 2004) (citing Koon v. United States, 518 U.S. 81, 100 (1996)). The question of

assignment to a different district court judge is entrusted to this Court's discretion. See 28 U.S.C. § 2106.

ARGUMENT

I. THE JULY 12 ORDER SHOULD BE VACATED.

A. The District Court's Invocation Of Rule 23(d) Is Wholly Misplaced.

1. The July 12 order requires Interior to include in all communications with Indian beneficiaries, regardless of subject matter, a statement 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." 229 F.R.D. at 24. Beneficiaries are explicitly cautioned that they "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." Ibid.

The district court emphasized that its ruling "represents a significant victory for the plaintiffs," and would make Indian beneficiaries aware of "the danger involved in placing any further confidence in the Department of the Interior." Id. at 23. In this way, the notice would advance the court's goal of discouraging Indians from engaging in land transactions or disposing of other trust assets pending completion of the "accounting" required by the structural injunction. The court observed that "the only way to fully safeguard this right would

be to suspend all trust-related decision-making until this case concludes," but that the relief ordered would "have to suffice as an interim measure," id. at 16 n.8.

2. The sole source of authority cited by the district court for this extraordinary ruling is Rule 23(d) of the Federal Rules of Civil Procedure. That rule provides authority for orders dealing with "procedural matters." See Fed. R. Civ. P. 23(d)(5). In particular, clause (2) authorizes a court to require that notice be given "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[.]" Fed R. Civ. P. 23(d)(2).

This provision echoes and complements Rule 23(c), which governs the notice that is given when a class is first certified. For example, when a class is certified under Rule 23(b)(3), the court must direct to class members a notice that states "the nature of the action"; "the definition of the class certified"; "the class claims, issues, or defenses"; "that a class member may enter an appearance through counsel if the member so desires"; "that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded"; and "the binding effect of a class judgment on class members under Rule 23(c)(3)." Fed. R. Civ. P. 23(c)(2)(B). As the terms of Rule 23 reflect, the point of the notice is to "convey[] objective, neutral information about the nature of the

claim and the consequence of proceeding as a class." Kleiner v. First Nat'l Bank, 751 F.2d 1193, 1203 (11th Cir. 1985) (citing In re Nissan Motor Corp. Antitrust Litig., 552 F.2d 1088, 1104-05 (5th Cir. 1977)).[2]

3. There can be no serious contention that the July 12 order directs Interior to convey neutral or objective information about the status of the litigation. The court was quite right in declaring that its ruling "represents a significant victory for the plaintiffs." 229 F.R.D. at 23. The order states a conclusion based on legal and factual premises that are hotly disputed. Its express purpose is not to govern the conduct of the litigation, but to influence the primary conduct of class member beneficiaries by making them aware of "the danger involved in placing any further confidence in the Department of the Interior." Ibid.

Consistent with its purpose, the July 12 order does not require Interior to send a one-time notice to class members. Instead, "[n]otice must accompany all written communications from Interior to current or former IIM account-holders without regard to subject matter." Id. at 17. The court explained that this "requirement ensures maximum protection, as it is difficult to determine, ex ante, the kinds of information that might influence

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[2] Similarly, Rule 23(h)(1) requires that notice of a motion for attorney fees be directed to class members in a reasonable manner. The district court recently held that plaintiffs' counsel may provide notice of their motion for more than $14,500,000 in attorney fees through publication on their website and in specified newspapers. JA __ [Docket ##3209-10].

an Indian beneficiary's trust-related decisions. With so much at stake, the Court greatly prefers over-inclusion to under-inclusion." Ibid. The order's "functional effect" is thus to require a steady rain of warnings accompanying communications made in the "'ordinary course of business.'" Id. at 16. The order is no more authorized by Rule 23(d) than a requirement that a manufacturer sued in products liability litigation place warning labels on its products. Such an "interim measure" pending conclusion of the class action litigation would be nothing more or less than a merits-based injunction.

4. Unsurprisingly, the district court identified no case requiring a notice even remotely similar to the notice required by its July 12 order. In In re School Asbestos Litigation, 842 F.2d 671 (3d Cir. 1988), the Third Circuit merely held that an association could be required, in its communications with class members, to disclose the existence of the litigation and its undisputed affiliation with the defendant asbestos manufacturers. Similarly, in Barahona-Gomez v. Reno, 167 F.3d 1228, 1236-37 (9th Cir. 1999), the Ninth Circuit sustained an order requiring the Immigration and Naturalization Service to include in deportation notices to a class of illegal aliens a statement informing the class of the pendency of the litigation and the fact that a preliminary injunction had been entered. By contrast, the Eighth Circuit in Great Rivers Cooperative v. Farmland Industries, 59 F.3d 764 (8th Cir. 1995), vacated an order compelling the defendant to print in its newsletter an article written by the

class plaintiffs, stressing that such forced speech is "rarely, if ever, appropriate." Id. at 766.

Since 2004, the government has already been required to inform class members of certain rights in all written communications concerning land sales. Cobell v. Norton, 224 F.R.D. 266, 288-89 (D.D.C. 2004). That order at least purported to convey neutral, procedural information, i.e., that the recipient of the communication might be a member of the class; that the rights of class members will not be adversely affected by the communications or related transactions; and that class members have a right to consult with class counsel before proceeding with any further communication or transaction.[3] The July 12 order, in contrast, compels Interior to announce that this case has demonstrated the unreliability of all of its trust-related information.

The district court fundamentally misunderstood the Supreme Court's teachings in Gulf Oil Co. v. Bernard, 452 U.S. 89 (1981), which vacated an order barring class counsel from communicating with prospective class members (even though the order had exempted communications made in the ordinary course of business). Id. at 95. The Supreme Court stressed that there was no "specific record showing" by the moving party that the restriction was needed to prevent an abuse of Rule 23, id. at 102, such as a threat of barratry-like solicitation of nonparty

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[3] The government has acquiesced in that order, although it believes it exceeds the district court's authority.

class members, id. at 100 & n.12. The Supreme Court further explained that even when such dangers are present, a court must take into account the harm that the restriction on communications might create, id. at 101, and must craft the "narrowest possible relief which would protect the respective parties," id. at 102.[4]

The district court did not issue its ruling to prevent abuses that may arise in class action litigation. Instead, the notice serves to undermine Interior's multi-faceted relationship with individual Indians and Indian Tribes without actually advancing the asserted goal of informed decision-making. To undermine trust in Interior is, of course, the stated goal of the order, which explicitly seeks to make Indians aware of "the danger involved in placing any further confidence in the Department of the Interior." 229 F.R.D. at 23. That is not even arguably a legitimate use of Rule 23(d).

B. The July 12 Order Was An Improper Injunction Ancillary To The Reissued Structural Injunction.

The July 12 order is plainly outside the scope of Rule 23, the only source of authority cited by the district court. It is equally clear that no other source of authority exists for an order of this kind.

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[4] Applying Gulf Oil, various courts of appeals have vacated orders restricting class counsel's communications with class members or potential class members. See, e.g., Williams v. Chartell Fin. Servs., Inc., 204 F.3d 748, 759 (7th Cir. 2000); Lewis v. Bloomsburg Mills, Inc., 773 F.2d 561, 563-64 (4th Cir. 1985); Zinser v. Continental Grain Co., 660 F.2d 754, 762 (10th Cir. 1981); Marmol v. Adkins, 655 F.2d 594, 595-98 (5th Cir. 1981).

The order does not require the Department to inform beneficiaries of a judicial decision made after consideration of trial evidence and subject to review by this Court. No decision in this case has held 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." 229 F.R.D. at 24. A court may not announce sweeping conclusions apart from the adjudication of the claims at issue and then compel a party to endorse those conclusions each day in the ordinary course of business.

At the time that it issued, the July 12 ruling formed an injunction ancillary to the re-issued structural injunction, designed as a means of preserving the status quo by discouraging land sales pending completion of the accounting ordered by the structural injunction. 229 F.R.D. at 15-16. An order designed to effectuate a multi-billion dollar injunction already stayed by this Court under the guise of a class notice was improper ab initio. This Court has now vacated the structural injunction's accounting provisions for a second time, and an order maintaining the "status quo" pending their implementation is even more obviously groundless.

As discussed above, the plan submitted by Interior for historical accounting activities, to which the district court "owed substantial deference," 2005 WL 3041512, at *5, calls for an accounting of funds in IIM accounts, and does not include the review of land transactions and trust assets ordered by the

structural injunction. It is unclear how any version of Interior's accounting plan could provide information that "would affect the decision of any given trust beneficiary on whether or not to sell trust land." 229 F.R.D. at 14-15 (quoting 225 F.R.D. at 52). Indeed, the district court was uncertain as to what effect even its own formulation of the accounting might have on such decisions. Ibid.[5] As the Conference Committee observed in 2003, following issuance of the original structural injunction, the expenditure of billions of dollars on the court-ordered accounting "'would not provide a single dollar to the plaintiffs, and would without question displace funds available for education, health care and other services.'" H.R. Conf. Rep. 108-330, at 117. What is plain is that the ostensible rationale for the July 12 order has ceased to exist.

C. The July 12 Order Was Without Factual Basis.

1. As discussed above, reversal would be required even if the "evidence" discussed in the July 12 opinion did not so manifestly fail to support the court's extraordinary assertions. The order is all the more remarkable for its want of a factual basis.

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[5] Pondering the connection between its order and its stated purpose, the court mused, "'[w]hile it is difficult to envision the ways in which information about this litigation and the historical accounting that Interior has been ordered to produce would affect the decision of any given trust beneficiary on whether or not to sell trust land, it is impossible to imagine that such information would have no effect at all.'" 229 F.R.D. at 14-15 (quoting 225 F.R.D. at 52).

In the first instance, the district court attempts to treat its conclusion as conceded: "Interior does not dispute the factual predicates of the plaintiffs' argument. Interior concedes that all trust-related information Interior communicates to Indian beneficiaries is inherently unreliable." 229 F.R.D. at 16. Unsurprisingly, the court provides no citation for this global, non-existent concession.

Alternatively, the court declares that "[o]f course, anything other than a concession of this point would be laughable in light of the record in this case." Ibid. By the "record," the court does not mean evidence adduced in the several trials in this case and tested by the adversary process. Instead, the court explained, "[t]he factual record [is] composed of the accumulated detritus of nine years spent examining Interior's odious performance as Trustee-Delegate for the Indian trust." Ibid.

To the extent that the July 12 decision discusses trust records at all, it largely reiterates the accusations of former Special Master Balaran, many dating back to 1999. Id. at 8. Taken at face value, these reports reveal that in amassing and storing 300-500 million pages of paper records in multiple storage facilities throughout the country, Interior at times encountered roof leaks, mouse droppings, and mold. In any event, the Special Master's statements are not the product of an adversarial process, and no connection between his observations and the accuracy of trust data has been established.

With respect to electronic records, the district court observed that it had previously ordered Interior to disconnect computer systems from the Internet on the basis of perceived inadequacies in electronic data security. Id. at 9. This Court vacated the injunction, however, noting that "there was no evidence that anyone other than the Special Master's contractor had 'hacked' into any Interior computer system housing or accessing" relevant data. 391 F.3d at 259. The district court also noted that, at the time the July 12 opinion issued, the court was in the midst of a 59-day hearing on plaintiffs' charge that Interior's electronic data is "at risk of corruption." 229 F.R.D. at 9. But the opinion that issued at the conclusion of that trial, on October 20, 2005, does not find that data has in fact been corrupted, and cites no evidence that any persons other than Special Master Balaran and experts retained by Interior's Inspector General have ever successfully hacked into any pertinent Interior systems.

Although the district court declared that "Interior cannot even determine which IIM account holders are members of the plaintiff class," 229 F.R.D. at 8 (citing May 28, 2004 Mem. & Order, at 2-3), the 2004 order cited by the court references the 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]. The district court also cited statements in its 1999 decision, referred to in this Court's 2001 decision, to the effect that Interior could not provide the exact number of IIM trust accounts that should have been on the system of the Office of Trust Funds Management. 229 F.R.D. at 8; see 91 F. Supp. 2d at 10 (noting that plaintiffs claimed that the total number of accounts should have been approximately 500,000 instead of approximately 300,000); 240 F.3d at 1089. Inasmuch as large numbers of IIM accounts open and close each year, it is unclear what the precise significance of this statement would have been even in 1999. In any event, plaintiffs' estimate has never been substantiated. The statement is now six years old, and, as this Court noted in reversing the reissued structural injunction, reliance on such stale information is improper. See 2005 WL 3041512, at *6.

Moreover, no obvious basis exists for the district court's inference that "[i]f 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?" 229 F.R.D. at 16. The ability to provide an immediate response as to the precise number of class members with certain IIM accounts reveals nothing about the accuracy of land appraisals or general land data.

The absence of specific references to trial findings is unsurprising. None of the several trials in this case has adjudicated the reliability of land appraisals or land

information generally. The initial trial in 1999 resulted in a determination that Interior had unreasonably delayed in providing an accounting for funds in IIM accounts deposited pursuant to the 1938 statute concerning investment of funds. As this Court stated in largely affirming the judgment, the requirement of the 1994 Act to account for "'all funds' 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)." 240 F.3d at 1102. As this Court explained, the "legal breach is the failure to provide an accounting." Id. at 1106.

Nor have any of the later trials tested the reliability of land appraisals or trust data generally. For that matter, only the 2002 contempt trial even considered the issue of Interior's progress in conducting the accounting of funds held in IIM accounts, and the contempt citations were vacated by this Court. No later trial has evaluated Interior's further progress regarding historical accounting activities, even though obligated funds already exceed $100 million, JA __ [2005 Cason Decl. 3], and, as of December 2004, Interior had accounted for 36,701 judgment accounts with balances totaling almost $53 million and 7,360 per capita accounts with balances of approximately $21.7 million, and had completed work on 8,496 special deposit accounts totaling over $40.8 million. JA __ (Status Report to the Court Number Twenty-One at 16-24 (May 2005)).

Finally, it should be clear that the district court's declaration that "any information" may be "unreliable," 229

F.R.D. at 24, in no way simply restates the obvious fact that Interior is conducting an historical accounting of funds in IIM accounts and that Congress, in enacting the 1994 Act, was concerned about the state of IIM account records. First, as discussed, the district court proceedings have not and could not have yielded any conclusions as to the reliability of "any information related to the IIM Trust, IIM Trust lands, or other IIM Trust assets." Ibid. Second, the statement would be inaccurate even with respect to the IIM accounts that were the subject of the 1999 trial. An historical accounting will provide more information to account holders regarding past transactions, and the procedures proposed by Interior may discover past accounting errors. But the statement that the evidence of this litigation shows that "any information related to the IIM Trust, IIM Trust lands, or other IIM Trust assets may be unreliable" suggests that the court has adjudicated some level of unreliability that a prudent person would regard as sufficiently troubling to warrant postponement of trust transactions. No such determination has ever been made, and the state of knowledge regarding IIM accounts and records is far different now than it was in 1999. With respect to the funds in IIM accounts, the court's statement simply prejudges the outcome of historical accounting activities.

2. The district court's conclusion that Indians should be warned against relying on Interior Department information is based not on a careful analysis of facts, but on its belief that

Interior will "lie to the Indians." 229 F.R.D. at 16. The relevant background, in the court's view, is the saga of "scandals, deception, dirty tricks and outright villainy - the end of which is nowhere in sight." Id. at 11.

Even if this account were not devoid of substance, it is unclear how various moral and ethical failings would support a declaration that all trust information is unreliable. But the court's catalogue of "villainies" does not withstand scrutiny. For example, the court observed that it had "held Secretary of the Interior Gale Norton and former Assistant Secretary of Indian Affairs Neal McCaleb in civil contempt for, among other things, misleading the Court about the status of Interior's trust reform efforts and computer security." Id. at 9. The court announced that it would treat the "factual findings" in its contempt ruling as "established" notwithstanding this Court's decision vacating the citations of contempt. Id. at 9 n.1.

But as this Court made clear in vacating the reissued structural injunction, the district court could not properly rely on its contempt findings "even though this court had in the meantime ruled that the record was inadequate to support the contempt citations." 2005 WL 3041512, at *5. This Court's contempt decision addressed the charge that Secretary Norton and Assistant Secretary McCaleb had "misl[ed] the Court about the status of Interior's trust reform efforts and computer security," 229 F.R.D. at 9, and found "the reasoning of the district court mystifying." 334 F.3d at 1149; see also id. at 1150 ("We see no

finding of fact . . . that directly contradicts the statements . . . which the court identified as part of a fraud on the court."); ibid. ("we think it inconceivable that a departmental secretary may be held to have committed a fraud on the court because an attorney representing her Department argued in an adversarial proceeding that an adversary's motion critical of the Department was 'without merit'").

Equally puzzling is the district court's observation that it had "referred a number of Interior's litigation counsel from the Department of Justice to the Court's Committee on Grievances after reviewing evidence indicating that they had participated in Interior's efforts to communicate with plaintiff-class members without authorization from plaintiffs' counsel in violation of D.C. Rule of Professional Conduct 4.2(a)." 229 F.R.D. at 9. The referral was based on the district court's belief that Interior's sending completed account statements to class members constituted impermissible contacts with represented parties, a conclusion that, even if correct, would provide no support for the present ruling. Moreover, as the district court was obliged to acknowledge, the Committee on Grievances determined that no action was warranted. Ibid.

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. 229 F.R.D. at 10. The charge was contested, see JA__ [Docket #684], and the dispute was settled when Ms. Infield was allowed to continue working out of the Albuquerque office. 229 F.R.D. at 10. Settlement of a disputed charge does not establish guilt, and certainly does not reflect 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. 229 F.R.D. at 10-11. As Interior's uncontradicted affidavits made clear, the two complaining beneficiaries had received their checks in the ordinary course. See JA __ [Docket ##2764-65, 2781-82, 2845]; Cobell v. Norton, 355 F. Supp. 2d 531, 531-36 (D.D.C. 2005). Nevertheless, the district court 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 JA __ [Docket #2845].)[6]

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[6] 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.
(continued...)

The basic premise of the July 12 order is encapsulated in the court's rhetorical question: "If Interior is willing to deceive this Court, why would anyone think that Interior would hesitate to lie to the Indians?" 229 F.R.D. at 16. No factual basis for the charges of rampant, systemic mendacity can be found in "the accumulated detritus of nine years," as the district court characterizes the "factual record," ibid. The court's premise is baseless, as is its conclusion that its pervasive intervention is required because the government will not "hesitate to lie to the Indians." Ibid.

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

Regardless of the manner in which it is styled, an order having the practical effect of an injunction, and threatening serious, perhaps irreparable consequences, is immediately appealable under 28 U.S.C. § 1292(a)(1). See Carson v. American Brands, Inc., 450 U.S. 79, 84 (1981).

The July 12 order compels Interior to alter the content of all of its written communications with trust beneficiaries regardless of subject matter, in order to discourage the

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[6](...continued)
See JA__ [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. This ruling is wholly unfounded and, in any event, casts no doubt on the central fact that the checks were sent in the ordinary course of business.

beneficiaries from relying on any information provided by Interior. It coerces Interior to endorse vigorously disputed propositions in a steady stream of documents issued on an ongoing basis in the ordinary course of business. The resulting harm is significant and immediate and could not be remedied on appeal from final judgment, which the district court does not intend to issue at any point in the foreseeable future. The district court may have been less than fully serious when it suggested that the litigation might require the full extent of the court's life tenure, see 226 F. Supp. 2d at 161, but the reissued structural injunction, now vacated by this Court, had purported to extend the court's jurisdiction to March 27, 2011, 357 F. Supp. 2d at 306. 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 v. Secretary of Health and Human Services, 762 F.2d 158, 161 (1st Cir. 1985) (Breyer, J.) (holding that a Rule 23(d) order directing the Department of Health and Human Services to issue specified notices to class members was an appealable injunction); see also Great Rivers Cooperative, 59 F.3d at 766 (holding that a Rule 23(d) order directing the defendant cooperative to print in

its newsletter a statement from the plaintiffs regarding the litigation was an appealable injunction).

Plaintiffs have nonetheless moved to dismiss this appeal, urging that the July 12 order relates only to the conduct or progress of the litigation. Motion to Dismiss at 9. But, as we have discussed, the July 12 order does not direct Interior to convey procedural information about the litigation; it compels Interior to impugn the integrity of all of its trust-related information in every written communication with members of the class, regardless of subject matter, in order to dissuade class members from disposing of any trust lands or other assets. The order does not govern the conduct of the litigation; it is a substantive order that aims to affect the primary conduct of the class.

Plaintiffs alternatively suggest that the July 12 order is not an injunction because "it does not afford the ultimate substantive relief - an adequate historical accounting and effective trust reform to furnish adequate statements of account going forward - that Plaintiff-Beneficiaries seek in this litigation." Motion to Dismiss at 10-11. The premise is clearly wrong; even plaintiffs do not dispute that the recent order directing Interior to disconnect computer systems from internal and external networks is an appealable injunction, although it is not part of the ultimate relief that plaintiffs seek. But even if this Court were to accept plaintiffs' view that the July 12 ruling is collateral to the merits, the order would be subject to

immediate review, not only as an injunction, but also under the collateral order doctrine. See, e.g., Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 171-77 (1974) (holding that an order allocating 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) (holding that an 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).

Finally, as we urged in seeking a stay, if the Court nonetheless has doubts about its appellate jurisdiction, we respectfully ask that the Court treat the appeal 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)). The court was without authority to issue the July 12 order, and the significant resulting harm could not be reversed on appeal from a distant final judgment.

II. THE CASE SHOULD BE ASSIGNED TO A DIFFERENT DISTRICT COURT JUDGE.

This Court's authority to order assignment to a different judge is not open to dispute. See 28 U.S.C. § 2106; United States v. Microsoft Corp., 56 F.3d 1448, 1463 (D.C. Cir. 1995) (per curiam). An assignment decision balances the interest in assuring fairness and the appearance of justice against waste entailed in a new assignment, a determination that also requires

the Court to consider whether the district court's disposition is so firmly established that its experience in the litigation will be a drawback rather than a gain in efficiency. As this Court summarized in United States v. Wolff, 127 F.3d 84, 88 (D.C. Cir. 1997), an assignment decision weighs three "principal factors":

> (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind the previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected,
>
> (2) whether reassignment is advisable to preserve the appearance of justice, and
>
> (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness.

(quoting United States v. Robin, 553 F.2d 8, 10 (2d Cir. 1977) (en banc) (per curiam)); see also Bembenista v. United States, 866 F.2d 493, 499 (D.C. Cir. 1989) (applying Robin in civil litigation). In this litigation, these factors are closely related.

A. The Appearance of Justice.

The July 12 decision sets out a comprehensive moral and ethical indictment of the Department of the Interior, its officers and employees without anchor in any proceeding held in the nine years consumed by this litigation. It could scarcely be imagined that any court would issue an unfounded denunciation of this kind if the district court had not actually done so.

In its ruling, the district court is at pains to link past racism and mistreatment of Indians with present officers and employees. The court observes, for example, that "it is unlikely

that those who concocted the idea of this trust had the Indians' best interests at heart," noting that the original General Allotment Act created the trust in 1887 "at a time when the government was engaged in an 'effort to eradicate Indian culture' that was fueled, in part, 'by a greed for the land holdings of the tribes[.]'" 229 F.R.D. at 7 (citation omitted). The court declares that "regardless of the motivations of the originators of the trust, one would expect, or at least hope, that the modern Interior department and its modern administrators would manage it in a way that reflects our modern understandings of how the government should treat people." Ibid. But, the court concludes, these hopes have not been fulfilled: "Alas, our 'modern' Interior department has time and again demonstrated that it is 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 had left behind." Ibid.

In a similar vein, the district court declares that the evidence in this case demonstrates that Interior has made no clean break from shameful events of the past. The court has a stern message "[f]or those harboring hope that the stories of murder, dispossession, forced marches, assimilationist policy programs, and other incidents of cultural genocide against the Indians are merely the echoes of a horrible, bigoted

government-past that has been sanitized by the good deeds of more recent history." Ibid. These hopes are ill-founded, because

> this case serves as an appalling reminder of the evils that result when large numbers of the politically powerless are placed at the mercy of institutions engendered and controlled by a politically powerful few. It reminds us that even today our great democratic enterprise remains unfinished. And it reminds us, finally, that the terrible power of government, and the frailty of the restraints on the exercise of that power, are never fully revealed until government turns against the people.

Ibid.

The court thus felt it appropriate to speculate on which sin most prominently characterizes Interior's "present leaders." Are they "evil people, deriving their pleasure from inflicting harm on society's most vulnerable"? Id. at 22. Or are they "apathetic people who just cannot muster the necessary energy or emotion to avoid complicity in the Department's grossly negligent administration of the Indian trust"? Ibid. Or "maybe Interior's officials are cowardly people who dodge their responsibilities out of a childish fear of the magnitude of effort involved in reforming a degenerate system." Ibid. (emphases added).

The story of Interior's "degenerate tenure as Trustee-Delegate for the Indian trust," is portrayed as a seamless ongoing outrage, featuring "scandals, deception, dirty tricks and outright villainy - the end of which is nowhere in sight," id. at 11 (emphasis added). The crucial point, the court emphasizes, is "the raw, shocking, humiliating truth at the bottom: After all these years, our government still treats Native American Indians as if they were somehow less than deserving of the respect that

should be afforded to everyone in a society where all people are supposed to be equal." Id. at 7.

The court could not have been clearer. The present Department and its officials are not merely out of compliance with legal requirements. They are not merely inept. (In the context of this opinion, "ineptitude" is a comparative good.) They are not merely the inheritors of a sorry tradition. Instead, they are themselves "morally and culturally oblivious," and "the last pathetic outpost of the indifference and anglocentrism." 229 F.R.D. at 7. Interior and its leadership have not broken with the racism of the past and still treat "Native American Indians as if they were somehow less than deserving of the respect that should be afforded to everyone in a society where all people are supposed to be equal." Ibid. Indeed, they are living proof that "our great democratic enterprise remains unfinished." Ibid.

The court saw fit to level these gravest of charges without a scintilla of justification. Even if the court's analysis of the "detritus" of the record, 229 F.R.D. at 16, were not flawed on its own terms (as discussed above), it would not, of course, provide any basis for sweeping indictments of ongoing pernicious racism.

The present charges are not the first instance of unjustified personal condemnation in this litigation. In imposing contempt sanctions against Secretary Norton in 2002, the district court labeled Interior's conduct "despicable," and it

declared that "Secretary Norton and Assistant Secretary McCaleb can now rightfully take their place alongside [their predecessors] in the pantheon of unfit trustee-delegates." 226 F. Supp. 2d at 135, 161. When Congress, in 2003, enacted legislation that attempted to limit the compensation of the special masters in this litigation, the court denounced Congress's actions as an improper ploy by Interior. The court decried the appropriations provisions as "yet another attempt by defendants to evade the rule of law by any means available to them, no matter how duplicitous or underhanded," declaring that the provisions "serve to demonstrate defendants' manifest hypocrisy." 263 F. Supp. 2d 58, 66 (D.D.C. 2003).[7] In 2004, the court announced that "[t]he factual record herein will likely stand for generations as a cautionary tale for those who would unquestioningly surrender their welfare, or the welfare of others, to the care of the administrative state." 224 F.R.D. 266, 286 (D.D.C. 2004). In February 2005, shortly before reissuing the (now re-vacated) structural injunction, the court charged the Department with "utter depravity and moral turpitude." Cobell v. Norton, 355 F. Supp. 2d 531, 541 (D.D.C. 2005).

But even these assertions pale before the condemnation of the July 12 order, which makes assignment to another judge a necessity if any appearance of justice is to be preserved.

---

[7] The legislation sought to limit the masters' pay to 200 percent of the highest Senior Executive Service rate of pay, for the Washington-Baltimore locality pay area.

Indeed, comparison to other cases in which matters have been assigned to a new judge only underscores how far this litigation has moved beyond the bounds of customary judicial conduct. See Haines v. Liggett Group, Inc., 975 F.2d 81, 87-88, 97-98 (3d Cir. 1992) (reassignment required because the trial judge, in the course of a procedural ruling, suggested the tobacco defendants "may be the king[s] of concealment and disinformation"); United States v. Torkington, 874 F.2d 1441, 1447 (11th Cir. 1989) (reassignment required after two reversals and comment that prosecution was "silly" and a "vendetta"); see also Mitchell v. Maynard, 80 F.3d 1433, 1450 (10th Cir. 1996) (reassignment required in light of "[t]he history of the case, combined with evidence of [the trial judge's] expressions of his disapproval toward [the plaintiff], his attorney and his claims").

The ruling here has no counterpart. The district court has concluded that the defendants are morally oblivious racists. That is not a legal ruling, subject to correction by this Court. Still less is it a finding of "fact." It is a baseless, intractable moral condemnation. Convictions of this nature, expressed with such fervency, cannot be set aside even if this Court were to admonish that the statements were improper. No reasonable observer would believe that a court that has viciously and baselessly denounced a cabinet department and its leadership as villainous racists could properly oversee its activities and adjudicate further claims. No reasonable litigant would believe that he was required to endure such a regime, and in this

respect, the government is entitled to no less. This state of affairs cannot be permitted to persist.

B. The District Court's Ability To Set Aside Previously Expressed Views.

The court's deep-seated moral condemnation of defendants no doubt accounts in significant measure for the repeated interventions by this Court and Congress. In 2001, this Court largely affirmed a declaratory judgment that would have remanded the case to the agency to permit it to perform an accounting of funds deposited in IIM accounts. Since that time, this Court has: (1) reversed an order of contempt against the Secretary of the Interior; (2) reversed a structural injunction governing both accounting and fiduciary activities; (3) reversed an injunction requiring wholesale computer disconnection from the Internet; (4) reversed the re-issued structural injunction regarding accounting activities; (5) required disqualification of Special-Master Monitor Kieffer; and (6) required disqualification of Special Master Balaran from contempt proceedings involving 37 individuals. Still pending are the appeal from the present order (previously stayed by this Court); the appeal from the new, October 20, 2005 computer disconnection order (administratively stayed by this Court); and the government's mandamus petition regarding Special Master Balaran, who resigned on the eve of the date originally scheduled for this Court's oral argument.

The district court's conviction that Interior's officers and employees are fundamentally untrustworthy has led directly to the issuance of the two structural injunctions reversed by this

Court. Both of these injunctions were explicitly premised on the district court's vacated contempt ruling and its conclusion that Secretary Norton was an "unfit" trustee. Similarly, the court's extraordinary use of special masters, charged with "an investigative, quasi-inquisitorial, quasi-prosecutorial role that is unknown to our adversarial legal system," 334 F.3d at 1142, reflects the same conviction.

The July 12 decision itself reflects the extent to which the court's moral condemnation has caused it to depart from judicial norms. As we have shown, that order, without legal authority, seeks to discourage Indians from engaging in trust transactions. It does so by improperly requiring the government to repeatedly and inaccurately inform trust beneficiaries that this litigation has determined that all trust information may be inaccurate and should not be relied on. The court's order is rendered even more extraordinary by its frankly stated premise that the order "likely will bring to light a wealth of new evidence concerning Interior's mismanagement of the trust." 229 F.R.D. at 23. Thus, the July 12 order not only declares conclusions without grounding in any of the multiple trials; it further assumes the existence of "a wealth of new evidence concerning" unspecified instances of trust mismanagement. This statement is emblematic of the court's unshakeable view that Interior is guilty of global malfeasance, and that the court's duty is to ferret out the evidence of its misdeeds.

Repeated reversals in the same case are sufficient grounds for assignment to a new judge. See, e.g., Conley v. United States, 323 F.3d 7, 15 (1st Cir. 2003) (en banc) (reassignment after three reversals); Mackler Prods., Inc. v. Cohen, 225 F.3d 136, 146-47 (2d Cir. 2000) (reassignment after two appeals on sanctions issues). When multiple reversals reflect an unfounded, extreme, and intractable moral judgment, actual justice as well as the appearance of justice call for assignment to a different judge.

C. Effect of Reassignment on Judicial Resources.

The goal of this litigation endorsed in this Court's 2001 decision was to accelerate performance of the agency's duties, in particular its duties pertaining to providing the account statements contemplated by the 1994 Act. This Court's decision, rendered nearly five years ago, anticipated that the case would be remanded to Interior to permit the agency to proceed with actions in accordance with this Court's mandate.

The district court's conduct of this litigation has obstructed that goal at every turn. The remand to the agency was terminated virtually before it began. The structural injunctions have repeatedly precluded the agency from implementing its own plans for historical accounting. The court has repeatedly banned the use of statistical sampling in the accounting process, multiplying the time and expense of any historical accounting many times over. 2005 WL 3041512 at *7-8. The original structural injunction required action by Congress, which, in Pub.

L. No. 108-108, not only removed the legal basis for the injunction but also "limited the funds available to the Department for historical accounting to those activities that need to be accomplished and can be accomplished in the short-term." H.R. Conf. Rep. 108-330, at 117; see also Pub. L. No. 108-108, 117 Stat. 1263. The latest computer disconnection order would require Interior to disconnect major computer systems from both external and internal communications, even though the manifest result of an order disabling computer networks would be to undermine the very accounting activities that this Court sought to accelerate.

Since 2001, Interior's resources have been consumed with response to litigation. The contempt trial (in 2002) consumed 29 days, the Phase 1.5 trial (in 2003) took 44 days, and the latest hearing on computer security (in 2005) lasted 59 days and involved the production of over four million pages of documents. Countless motions and hearings have required incalculable investment of time and energy. To date, the district court has issued more than fifty published opinions. This Court has heard argument in seven appeals, with multiple matters still pending.

And what of the IIM account holders, who are the supposed beneficiaries of the litigation? The district court has twice imposed a multi-billion dollar structural injunction that "would not provide a single dollar to the plaintiffs, and would without question displace funds available for education, health care and other services." H.R. Conf. Rep. 108-330, at 117. "Because the

district court reissued the injunction sua sponte without holding a hearing or even soliciting briefs from the parties, it failed to recognize that no party favored the injunction" as written. 2005 WL 3041512, at *6.

Notwithstanding the injunctions, as of December 31, 2004, Interior had accounted for judgment accounts with balances totaling almost $53 million and per capita accounts with balances of approximately $21.7 million, and had completed work on special deposit accounts totaling over $40.8 million. JA __ (Status Report to the Court Number Twenty-One at 16-24 (May 2005)). But the district court's orders restricting communications with the class preclude Interior from delivering any account statements to beneficiaries without leave of the court, and a request for leave to deliver statements has been pending since March 2005. JA __ [Docket #2914].

In short, for the nearly five years since this Court's 2001 decision, progress in accounting activities has been made in spite of, not as a result of, the district court's continuing intervention. Considerations of efficiency alone would justify reassignment. But even assuming that assignment to a different judge would entail some initial loss of efficiency, the district court's statements leave no doubt that reassignment is necessary to preserve the appearance of justice.

CONCLUSION

For the foregoing reasons, this Court should vacate the order of July 12, 2005, and direct that the case be assigned to a different district court judge.

Respectfully submitted,

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NOVEMBER 2005

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(c) OF THE FEDERAL RULES OF APPELLATE PROCEDURE

I hereby certify pursuant to Fed. R. App. P. 32(a)(7)(C) that the foregoing brief contains 13,989 words, according to the count of Corel WordPerfect 12.

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CERTIFICATE OF SERVICE

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STATUTORY ADDENDUM

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IV. PARTIES
IV. Parties

➡Rule 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually

controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determining by Order Whether to Certify a Class Action; Appointing Class Counsel; Notice and Membership in Class; Judgment; Multiple Classes and Subclasses.

(1)(A) When a person sues or is sued as a representative of a class, the court must--at an early practicable time--determine by order whether to certify the action as a class action.

(B) An order certifying a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) An order under Rule 23(c)(1) may be altered or amended before final judgment.

(2)(A) For any class certified under Rule 23(b)(1) or (2), the court may direct appropriate notice to the class.

(B) For any class certified under Rule 23(b)(3), the court must direct to class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must concisely and clearly state in plain, easily understood language:

• the nature of the action,

• the definition of the class certified,

• the class claims, issues, or defenses,

• that a class member may enter an appearance through counsel if the member so desires,

• that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded, and

• the binding effect of a class judgment on class members under Rule 23(c)(3).

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (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 present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Settlement, Voluntary Dismissal, or Compromise.

(1)(A) The court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class.

(B) The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise.

(C) The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.

(2) The parties seeking approval of a settlement, voluntary dismissal, or compromise under Rule

23(e)(1) must file a statement identifying any agreement made in connection with the proposed settlement, voluntary dismissal, or compromise.

(3) In an action previously certified as a class action under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(4)(A) Any class member may object to a proposed settlement, voluntary dismissal, or compromise that requires court approval under Rule 23(e)(1)(A).

(B) An objection made under Rule 23(e)(4)(A) may be withdrawn only with the court's approval.

(f) Appeals. A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) Class Counsel.

(1) Appointing Class Counsel.

(A) Unless a statute provides otherwise, a court that certifies a class must appoint class counsel.

(B) An attorney appointed to serve as class counsel must fairly and adequately represent the interests of the class.

(C) In appointing class counsel, the court

(i) must consider:

• the work counsel has done in identifying or investigating potential claims in the action,

• counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action,

• counsel's knowledge of the applicable law, and

• the resources counsel will commit to representing the class;

(ii) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(iii) may direct potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney fees and nontaxable costs; and

(iv) may make further orders in connection with the appointment.

(2) Appointment Procedure.

(A) The court may designate interim counsel to act on behalf of the putative class before determining whether to certify the action as a class action.

(B) When there is one applicant for appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1)(B) and (C). If more than one adequate applicant seeks appointment as class counsel, the court must appoint the applicant best able to represent the interests of the class.

(C) The order appointing class counsel may include provisions about the award of attorney fees or nontaxable costs under Rule 23(h).

(h) Attorney Fees Award. In an action certified as a class action, the court may award reasonable attorney fees and nontaxable costs authorized by law or by agreement of the parties as follows:

(1) Motion for Award of Attorney Fees. A claim for an award of attorney fees and nontaxable costs must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision, at a time set by the court. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) Objections to Motion. A class member, or a party from whom payment is sought, may object to the motion.

(3) Hearing and Findings. The court may hold a hearing and must find the facts and state its conclusions of law on the motion under Rule 52(a).

Federal Rules of Civil Procedure Rule 23

(4) Reference to Special Master or Magistrate Judge. The court may refer issues related to the amount of the award to a special master or to a magistrate judge as provided in Rule 54(d)(2)(D).

Fed. Rules Civ. Proc. Rule 23, 28 U.S.C.A., **FRCP Rule 23**

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