

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

ELOUISE PEPION COBELL, et al.,  
Plaintiffs-Appellees,  
v.  
GALE A. NORTON,  
Secretary of the Interior, et al.,  
Defendants-Appellants.

No. 03-5314

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

**REPLY IN SUPPORT OF GOVERNMENT'S MOTION FOR  
STAY PENDING APPEAL AND OPPOSITION TO  
PLAINTIFFS' MOTION TO VACATE ADMINISTRATIVE STAY**

The Structural Injunction at issue on this appeal marks an unprecedented judicial takeover of executive branch functions. This litigation has, in every way, become unmoored from its origin as a suit to compel an accounting that had been unreasonably delayed.

This Court, in its initial decision, affirmed what it thought to be relatively modest relief, requiring that Interior perform an accounting consistent with its decision, but affording the agency appropriate discretion to fashion the means for conducting that accounting. Plaintiffs point to no evidence of further unreasonable delay since this Court's decision. As this Court previously recognized in vacating the district court's order holding the Secretary of the Interior in contempt for failing to initiate a historical accounting, the evidence demonstrated the Secretary's commitment to the performance of an accounting. The "Phase 1.5" trial that preceded the present injunction provided no evidence of delay, and plaintiffs cite none. To the contrary, building on its prior accomplishments, Interior presented a plan to perform a historical accounting within five years at a cost of \$335 million (an amount nearly as great as the funds in the accounts at issue).

Plaintiffs can offer no plausible explanation for the transformation of this litigation, and can offer no defense of an injunction that arrogates to the district court the responsibilities vested in the political branches and which imposes costs of at least \$6 billion without any apparent benefit to plaintiffs or the public.

Congress, in the wake of the district court's ruling, made clear its view that the district court had seriously misunderstood the law as it had existed and altered substantive law. As Congress explained, it had previously "stated in no uncertain terms that it would not appropriate billions of dollars for a historical accounting." H.R. Conf. Rep. 108-330, at 117 (Oct. 28, 2003). Congress stressed that it would be "devastating to Indian country" to divert billions of dollars in the manner required by the court's injunction. *Ibid.* Believing that urgent action was required, Congress amended the law to provide that nothing in substantive law shall "be construed or applied to require the Department of the Interior to commence or continue historical accounting activities" with respect to Individual Indian Money accounts, and indicated that it would consider additional legislation in the course of the coming year. Pub. L. 108-108.

In their opposition, plaintiffs make no serious attempt to address the multiple fatal errors that would have required reversal of the structural injunction even absent congressional action. Nor do they suggest that requiring Interior to comply with the injunction would be consistent either with the terms of the new legislation or with Congress's assessment of the public interest generally and the interest of individual accountholders in particular.

Instead, plaintiffs offer three grounds for denying the stay and lifting the administrative stay entered by the Court. First, they argue that this Court lacks authority to grant a stay. Second, they urge that the new legislation is unconstitutional. Third, they argue in conclusory fashion that the government has failed to establish the prerequisites for a stay. As we show below, these contentions are baseless.

**A. This Court Has Full Authority To Issue A Stay.**

Plaintiffs urge that this Court lacked authority to issue an administrative stay and urge that the Court is compelled to await action by the district court. That is plainly not the case.

Rule 8 of the Federal Rules of Appellate Procedure "ordinarily" requires a party to file a motion for a stay pending appeal in the district court before seeking such relief in the Court of Appeals. Fed. R. App. P. 8(a)(1). Thus, as a general matter, even when a district court has indicated its view of the merits and balance of harms by issuing an injunction, the court should nevertheless

be asked whether that view extends to the granting of a stay pending appeal. However, when a district court actually announces that it will not grant a stay pending appeal, the purposes of Rule 8 are satisfied—the question of whether to grant a stay has been considered and resolved. That is even more clearly the case when the court declares that it will not even entertain a motion for a stay. As plaintiffs do not dispute, that is precisely the ruling issued by the district court in this case, which declared that it "will neither grant any stay of the structural injunction \* \* \* nor entertain any motion seeking such a stay." Historical Accounting Opinion ("Op.") at 228.

Even if it were assumed that the district court had not already ruled on the propriety of a stay, a judicial admonition that the court will not even entertain a stay motion takes the case out of the ordinary run of litigation. And pursuing a stay in the face of such a declaration would certainly be "impracticable." Fed. R. App. P. 8(a)(2)(A)(i).

Plaintiffs' argument is particularly difficult to fathom because the government satisfied even the most expansive reading of Rule 8 by filing its application for a stay in district court and explaining the status of the application in its motion to this Court. Rule 8 does not require that a party obtain a stay ruling from a district court before seeking appellate relief, and does not preclude a party from providing the court of appeals with filings necessary to allow it to consider the stay on the timetable it believes appropriate.

Chemical Weapons Working Group (CWWG) v. Departement of the Army, 101 F.3d 1360 (10th Cir. 1996), relied on heavily by plaintiffs, is inapposite in every respect. There is no indication that the district court in that case had declared its refusal to entertain a stay motion and the government at no time filed a stay application in district court. Moreover, the stay application in that case was made "predominately on the basis of new evidence," and the district court, as factfinder, was the "proper forum for presentation, testing and confrontation of the new evidence." Id. at 1362. In contrast, the government's stay application here does not turn on "new evidence" and requires no factfinding.

Plaintiffs also argue (at 11) that this Court lacks authority to issue a stay pending appeal because the district court's order allows the government to move in the district court to amend

deadlines for good cause. A party may always seek relief from an injunction for good cause, particularly when the district court has retained jurisdiction. That ability does not frustrate a litigant's ability to seek an appellate stay. Moreover, once a notice of appeal has been filed, a district court lacks jurisdiction to modify an injunction, except to preserve the status quo at the time of the appeal. See *Princz v. Fed. Republic of Germany*, 998 F.2d 1, 1 (D.C. Cir. 1993) ("[A]n appeal properly pursued from the district court's order divests the district court of control over those aspects of the case on appeal.").

The government has appealed from the entire structural injunction, including whatever allowance the district court might make for seeking to alter deadlines for good cause. As detailed in our motion, the structural injunction requires completion of 14 broad and significant tasks (many with significant sub-categories) by March 31, 2004. In addition, to comply with the long-term deadlines established by the injunction, Interior would be required to re-order priorities immediately. The question on this motion is whether, pending appeal, Interior should be required to pursue priorities and requirements without basis in law that will benefit no one and that would require the expenditure of enormous sums of money. That the government can ask the district court to amend some deadlines in no way detracts from the urgency of a stay and certainly does not affect this Court's authority to enter a stay. Indeed, the district court itself recognized the distinction between a stay motion and a motion to amend deadlines, indicating that it would entertain only the latter.

In sum, this Court had full authority to enter an administrative stay and has full authority to issue a stay pending appeal.

**B. Plaintiffs' Constitutional Challenge To Pub. L. 108-108 Is Without Merit.**

Plaintiffs urge that a stay is inappropriate because Pub. L. 108-108 is unconstitutional.<sup>1</sup>

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<sup>1</sup> Plaintiffs colorfully refer to the legislation as the "Midnight Rider" provision and suggest that the measure is somehow suspect because it was introduced by the Conference Committee. They neglect to mention that the House and Senate submitted their versions of the Interior appropriations bill before the district court issued its structural injunction on September 25, 2003. See 149 Cong. Rec. S12004 (Senate version passed on September 23, 2003); 149 Cong. Rec. H7104-05 (House (continued...))

As our stay motion made plain, issuance of a stay would have been warranted even if Congress had taken no action. Even if it were assumed that plaintiffs' constitutional objections had merit, the structural injunction would be fundamentally unsound and would require an immediate shifting of priorities to deal with requirements that should never have been imposed.

In any event, plaintiffs' constitutional challenge is meritless. It is established that Congress may amend the substantive law that provided the basis for an ongoing injunction. See, e.g., Miller v. French, 530 U.S. 327, 344 (2000); Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 232 (1995); Robertson v. Seattle Audubon Soc'y, 503 U.S. 429, 432-35, 441 (1992). An injunction that no longer has a basis in law must be vacated. See Miller, 530 U.S. at 347.

1. Plaintiffs nonetheless purport to discover two constitutional defects in the new legislation. Relying on Plaut, plaintiffs first contend that the new legislation offends separation of powers principles by overriding the district court's 1999 declaratory judgment ruling, as affirmed by this Court in 2001.

Plaintiffs' reliance on Plaut is misplaced for two independent reasons: The 1999 declaratory judgment was an interlocutory ruling, not a final judgment; and it awarded prospective relief, not damages.

As this Court has explained, Plaut, "while holding that Congress may not legislate to require federal courts to reopen suits for money damages after final judgment \* \* \* distinguished between pending cases and final judgments, saying that "[w]hen a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly." National Coalition To Save Our Mall v. Norton, 269 F.3d 1092, 1096 (D.C. Cir. 2001), cert. denied, 537 U.S. 813 (2002) (quoting Plaut, 514 U.S. at 226); see Plaut, 514 U.S. at 227 ("It is the obligation of the last court in

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<sup>1</sup>(...continued)

version passed on July 17, 2003). After the Conference Committee introduced the amendment on October 27, 2003, the House debated the measure for three days, see 149 Cong. Rec. H9970-71, H9992-95, H10197-203, and ultimately approved it on October 30. Id. at H10205. The Senate followed suit on November 3. 149 Cong. Rec. S13785-90.

the hierarchy that rules on the case to give effect to Congress's latest enactment, even when that has the effect of overturning the judgment of an inferior court, since each court, at every level, must decide according to existing laws.") (internal quotation marks omitted).

Plaintiffs do not contend that the structural injunction that is directly at issue on this appeal is a final judgment. Instead, they assert that the declaratory judgment issued in 1999 and affirmed in 2001 was final. This contention is difficult to fathom. The district court did not regard its 1999 ruling as a final judgment. To the contrary, it certified that ruling for interlocutory review pursuant to 28 U.S.C. § 1292(b). Cobell v. Babbitt, 91 F. Supp. 2d 1, 57 (D.D.C. 1999). Nor did the district court enter final judgment on remand. To the contrary, the injunction now on review arises in the same case on the basis of the same complaint.

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

The 1999 declaratory judgment awarded prospective relief, not damages. Thus, even if the ruling could be regarded as a final judgment, it would remain subject to changes in governing law.

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

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

The Supreme Court has made clear that “[w]hatever the precise scope of Klein \* \* \* its prohibition does not take hold when Congress ‘amend[s] applicable law.’” Plaut, 514 U.S. at 218 (quoting Robertson, 502 U.S. at 441). That principle holds even if the new law is intended to resolve a particular pending dispute. Thus, in Robertson, the Supreme Court rejected a separation of powers challenge to the Northwest Timber Compromise, an appropriations measure that expired by its terms at the end of the fiscal year, and that was enacted to resolve two pending lawsuits in which injunctions had already been entered. See 503 U.S. at 432-33. Although the measure provided that Congress “determines and directs that” the actions already taken by the government constituted “adequate consideration for the purpose of meeting the statutory requirements that are the basis for the consolidated cases” identified by caption in the legislation, id. at 434-35, the Supreme Court rejected the contention that it offended the separation of powers. See id. at 439-41; see also National Mall, 269 F.3d at 1097 (discussing Robertson).

Notwithstanding Robertson, plaintiffs insist that the new legislation cannot be viewed as an amendment to existing law because it provides that nothing in the otherwise governing law “shall be construed or applied” to require Interior to commence or continue historical accounting activities.

As the Fifth Circuit explained in rejecting the identical argument, “numerous statutory schemes use the language ‘shall be construed’ to describe the limitations and boundaries of a congressional delegation of authority.” First Gibraltar Bank, FSB v. Morales, 42 F.3d 895, 900 (5th Cir. 1995). Congress could have included the language of the new legislation in the 1994 Act itself, providing that the statute should not be “construed or applied” to authorize judicially imposed accounting requirements. Plainly, no constitutional questions would have been raised. That the language is contained in subsequent legislation does not alter the analysis. Just as Congress may include the phrase in its initial legislation to establish the substantive boundaries of a statute, it likewise may use the phrase in an amendment to establish such boundaries. See id. at 900 (rejecting

the plaintiff's contention that the phrase "shall be construed" indicated that the statutory amendment directed the judiciary to interpret the law in a particular way, and concluding that the measure instead "represent[ed] a change in the underlying law").

**C. The Government Has Demonstrated That  
All Factors Weigh Heavily In Favor Of A Stay.**

Finally, plaintiffs contend in conclusory fashion (at 26-30) that the structural injunction faithfully applied this Court's decision in Cobell v. Norton, 240 F.3d 1081 (D.C. Cir. 2001), and that the balance of harms and the public interest militate against granting of a stay.

1. Likelihood of Success on the Merits.

As we showed in our motion, the government would be entitled to a stay even if Congress had not enacted new legislation. As we discussed, this Court in its initial decision concluded that Interior had unreasonably delayed in performing an accounting and affirmed a remand to the agency to allow it to undertake that accounting. Emphasizing that the actionable duty at issue was the performance of an accounting and not subsidiary duties, the Court required the district court to amend its order and admonished it to be mindful of the limits on its jurisdiction. Id. at 1106, 1110.

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

This Court affirmed what it understood be "relatively modest" relief. Id. at 1109. It is now presented with a "structural injunction" that, to our knowledge, is without precedent in judicial review of executive branch action. Plaintiffs make no attempt to show how intervening events could be thought to justify this result. They point to no evidence of unreasonable delay in the recent Phase 1.5 trial. Nor do they explain how the district court could properly justify its takeover of Interior



operations on the basis of the contempt ruling that was reversed by this Court. See Cobell v. Norton, 334 F.3d 1128, 1150 (D.C. Cir. 2003).

As we discussed, this Administration has made performance of an accounting a priority, and, as this Court recognized, its efforts have resulted in considerable progress. See id. at 1148. The Interior Accounting Plan, which would have cost \$335 million, would, at a minimum, have fully comported with this Court's understanding of the duties at issue.

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

## 2. Balance of Harms and the Public Interest.

Plaintiffs' assessment of these factors is sharply at odds with that of Congress, which correctly concluded that the structural injunction "would require that vast amounts of funds be diverted away from other high-priority programs, including Indian programs." H.R. Conf. Rep. 108-330, at 117. The committee stressed that this "would be devastating to Indian country and to the other programs in the Interior bill." Ibid. As the committee explained, the expenditure of billions of dollars on an accounting "would not provide a single dollar to the plaintiffs[.]" Ibid.

Plaintiffs make no attempt to show why the congressional judgment is wrong in any respect. It is the case, of course, that the full impact of the injunction would not be felt at once. But, on their face, the plethora of detailed requirements that come due between now and March 31, 2004 leave no doubt that Interior's resources would be consumed with making progress toward goals that were

always unsound, have been rejected by Congress, and would result in no benefit to accountholders. Interior cannot simultaneously direct its efforts to performance of a court-ordered plan and also direct those same resources to the activities that Congress has directed should be the immediate focus of its efforts, such as accounting for per capita and judgment accounts. See Pub. L. 108-108; Cason Decl. at 12-13. Nor do plaintiffs dispute that, absent a stay, Interior may be subject to the appointment of a new Court Monitor and other agents with "unlimited access" to government facilities and extraordinary and entirely improper powers "to conduct confidential interviews" with government personnel. Order 17.

Similarly, plaintiffs do not explain how Congress erred in believing that the injunction "would not provide a single dollar to the plaintiffs[.]" Congress was not insensitive to the financial conditions of many accountholders. It recognized, however, that the diversion of billions of dollars would not improve those conditions and would adversely affect the Indian population.<sup>2</sup>

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

### CONCLUSION

The district court's September 25, 2003 injunction should be stayed pending appeal, and the administrative stay issued by the Court should remain in effect until issuance of the stay.

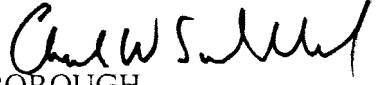
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<sup>2</sup> Moreover, as significant as the income from IIM accounts may be collectively, about 96% of the 193,800 land-based accounts receive less than \$250 per year, a consequence of the repeated divisions of land interests. Cason Decl. at 2.

Respectfully submitted,

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NOVEMBER 2003

## CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of November, 2003, I caused copies of the foregoing reply to be sent to the Court and to the following by hand delivery:

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