UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 1:96CV01285
	)	(Judge Lamberth)
GALE A. NORTON, Secretary of the Interior, et al.,	)	
	)	
Defendants.	)	
	)	

DEFENDANTS' MOTION TO STAY THE COURT'S STRUCTURAL INJUNCTION PENDING APPEAL

Defendants respectfully move to stay the Order Issuing Structural Injunction entered by the Court on September 25, 2003 ("Order"), pending the disposition of Defendants' appeal of that Order.[1] As discussed below, the Order should be stayed because new legislation has altered the law upon which the injunction was based. In addition, the vast expenditures that would be required for the Department of the Interior ("DOI" or "Interior") to meet the obligations set out in the Order require a stay pending resolution of these issues by the Court of Appeals.[2]

PRELIMINARY STATEMENT

[1] Pursuant to Local Civil Rule 7(m), counsel for Defendants has conferred with counsel for Plaintiffs regarding this motion, and Plaintiffs oppose the motion.

[2] Defendants are aware that the Court has stated that it will not entertain a motion for a stay of the injunction pending appeal, see Memorandum Opinion ("Historical Accounting") ("Op.") at 228, 249-50, and accordingly Defendants are seeking such relief from the Court of Appeals. See Fed. R. App. P. 8(a)(2)(motion for stay pending appeal may be made to the appellate court if, inter alia, "moving first in the district court would be impracticable"). However, because one of the bases for the relief Defendants seek is a change in the applicable law that has never been presented to this Court, Defendants move before this Court as well. See Fed. R. App. P. 8(a)(1)("A party must ordinarily move first in the district court" for, inter alia, a stay pending appeal). Out of an abundance of caution, Defendants also include in this motion additional grounds that are being raised before the Court of Appeals.

In January 2003, Interior issued a plan to complete an accounting within five years at a cost of $335 million. In its September 25, 2003 injunction Order, this Court rejected Interior's plan and now asserts judicial control over virtually all aspects of trust fund management. The injunction imposes a broad variety of requirements with compliance dates beginning November 24, 2003. See Order at 4, 7. The ultimate cost of the injunction is estimated to be at least six billion dollars. See Declaration of Associate Deputy Secretary of the Interior James E. Cason, executed November 10, 2003, and submitted herewith ("Cason Decl."), at 5. The injunction also provides for the appointment of a new "Judicial Monitor" and subordinate "agents" having "unlimited access" to DOI facilities and information and "the power to conduct confidential interviews" with DOI personnel. See Order at 17.

Congress, responding to the Court's ruling, has now enacted legislation changing the law governing DOI's duty to perform a historical accounting. That provision, contained in the FY 2004 Interior Appropriations statute, was signed into law on November 10, 2003. It provides:

> [N]othing in the American Indian Trust Management Reform Act of 1994, Public Law 103-412, or in any other statute, and no principle of common law, shall be construed or applied to require the Department of the Interior to commence or continue historical accounting activities with respect to the Individual Indian Money Trust until the earlier of the following shall have occurred:
>
> > (a) Congress shall have amended the American Indian Trust Management Reform Act of 1994 to delineate the specific historical accounting obligations of the Department of the Interior with respect to the Individual Indian Money Trust; or
> >
> > (b) December 31, 2004

H.R. 2691 (attached hereto as Exhibit A). The President has signed the new legislation into law.

A stay is plainly warranted in light of the new legislation. As Congress recognized in enacting the legislation, it would be "devastating to Indian country" to divert resources in the manner required by the injunction. See H.R. Conf. Rep. 108-330, at 117 (Oct. 28, 2003) (included with Exhibit A). Moreover, as discussed below, a stay would be warranted even absent the new legislation. The Court's wholesale assumption of executive branch responsibilities reflects a fundamentally mistaken assessment of the proper role of the judiciary and the nature of this case, is without record basis, and disregards the Court of Appeals' two prior decisions in this litigation.

As discussed in the Declaration of Associate Deputy Secretary Cason, DOI expects to proceed with significant steps related to the performance of an accounting pending the appeal and further action by Congress. It would be improper to require DOI to reallocate resources in a manner squarely foreclosed by Congress that would result in no discernible benefit to account holders. Accordingly, we ask this Court for an immediate stay of the entire Order pending appeal.

PERTINENT BACKGROUND

This Court has reviewed two plans submitted by Interior pursuant to Court order. The first was the Historical Accounting Plan for Individual Indian Money Accounts, directly addressing historical accounting issues. DOI also submitted a separate Fiduciary Obligations Compliance Plan, which concerned matters beyond the subject of historical accounting, including improvements to be made to help ensure that future accountings would be accurate. Later, DOI submitted to the Court an additional Comprehensive Trust Management Plan, which had not been required by the Court but was submitted for informational purposes only. The Comprehensive Trust Management Plan encompasses matters beyond the Fiduciary Obligations

Compliance Plan, covering the full range of Interior's trust responsibilities, including natural resource and asset management. Following a 44-day bench trial, the Court issued its injunction Order, accompanied by a "Historical Accounting" opinion and a "Fixing the System" opinion that radically transform the Interior Accounting Plan and Comprehensive Trust Management Plan and incorporated both, as altered, into the injunction.

A. The "Historical Accounting" Ruling

The injunction Order rejects virtually every premise and parameter of the DOI Accounting Plan. The DOI Plan would provide existing account holders (and holders of accounts opened since 1994), with an accounting of all transactions in their accounts since 1938. The Plan reflects the 1994 Act's directive, as interpreted by the Court of Appeals, that Interior account for trust funds "which are deposited or invested pursuant to the Act of June 24, 1938," Pub. L. 103-412, § 102(a); see Cobell v. Norton, 240 F.3d 1081, 1102 (D.C. Cir. 2001).

Under the DOI Plan, Interior would produce, based on existing paper and electronic bookkeeping records and without the use of statistical methods, a statement of account for each open IIM account that describes all of the post-1938 transactions in each account.[3] The Plan also identified the methods that would be used to verify the transactions set forth in the statement of account. For the approximately 200,000 land-based IIM accounts, Interior would examine the relevant records for all transactions of $5,000 or more. See DOI Accounting Plan at 1, I-1. Interior would examine statistically valid samples of the transactions below $5,000. See id. at 1.

[3] Under its Plan, DOI's historical accounting period would close on December 31, 2000, the date on which relevant Interior offices were converted to the Trust Funds Accounting System (TFAS). See DOI Accounting Plan at II-4. "Account information recorded since December 31, 2000, will be considered current accounting activity." Id.

Two statistically valid samples of about 80,000 transactions each would be selected from the Electronic Records Era (1985-2000). See id. A similar approach would be used to sample transactions from the Paper Records Era (pre-1985). See id. This sampling methodology would allow Interior to determine the accuracy rate of the accounting with a 99% degree of confidence. See id. The use of sampling reflects the fact that the vast majority of transactions involved relatively small sums of money. See Cason Decl. at 2, 4. It would also be consistent with the Court of Appeals' declaration that decisions about "how the accounting would be conducted, and whether certain accounting methods, such as statistical sampling or something else, would be appropriate," are "properly left in the hands of administrative agencies." 240 F.3d at 1104.

By contrast, the Court's injunction requires not only the production of a statement of account, but also an individualized verification of every transaction taking place from the time of the passage of the General Allotment Act of 1887, 24 Stat. 388. Op. at 165, 207-208. This includes a verification of changes in interests not only in funds held in trust for each individual Indian, which is the subject of this lawsuit, but of all interests in land allotments. Op. at 169-71. The accounting and verification must be performed for all accounts, even those that have long since been closed, although the account holder may have died decades ago. Op. at 159-63. Interior may not rely on probate determinations which, the Court ruled, have no conclusive effect in determining what interests should have been probated. Op. at 165-68. Interior must also account for funds never held in trust at all, but rather received by an allotment holder in a direct transaction with a third party. Op. at 172-76.

B. The "Fixing the System" Ruling

The Comprehensive Trust Management Plan submitted by Interior encompasses virtually every aspect of trust management, outlining in general terms the organizational changes proposed by Interior to improve its management and supervision of Indian trust funds and assets. It proposes the improvement of (1) accounting for trust funds, see DOI Comprehensive Plan at 3-7; (2) investing and disbursing funds, see id.; (3) maintaining accurate land ownership records, see id. at 3-6; and (4) managing Indian lands and resources. See id. "The change effort will be a DOI-wide transformation encompassing most aspects of the trust." Id. at 5-10.

In its "Fixing the System" opinion, the Court declared that the "scope and nature" of Interior's duties to IIM beneficiaries were "coextensive" with the duties of a common law trustee. Memorandum Opinion ("Fixing the System") (Sept. 25, 2003) ("FTS Op.") at 45; see also id. at 45-53 (outlining these duties). Although the duties described in the Comprehensive Trust Management Plan are without anchor in the duty to be enforced in this case, the Court adopted the plan, as modified, as an injunction. The modifications include: (1) Interior must file a "statement" detailing the manner in which it will comply with each of the common law trust duties the Court has set out, id. at 56; (2) In managing tribal resources, Interior must abide by tribal law, and must prepare a list of all applicable tribal laws and a statement of how they would affect trust administration, id. at 60; (3) Interior must submit a "detailed plan" for the integration of the title, leasing, and accounting systems, id. at 68; and (4) Interior must submit a statement "identify[ing] the steps" it would take during its historical accounting to distinguish IIM trust principal from income, id. at 68-69.

ARGUMENT

I. The Government's Appeal Will Succeed On The Merits

A. Congress Has Altered The Governing Law Underlying The Structural Injunction

As the Court of Appeals made clear in its initial opinion in this case, the only actionable duty at issue in this litigation is the duty to perform an accounting. Congress has now altered the governing law, providing that, pending further congressional action (or decision not to act), neither the 1994 Act nor any principles of common law incorporated into federal law "require the Department of the Interior to commence or continue historical accounting activities with respect to the Individual Indian Money Trust . . ." H.R. 2691.

As the Conference Report accompanying this legislation explained, Congress has 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. Observing that the accounting ordered by this Court was estimated to cost between six and twelve billion dollars, the committee explained that the ruling "would require that vast amounts of funds be diverted away from other high-priority programs, including Indian programs." Id. The committee stressed that this "would be devastating to Indian country and to the other programs in the Interior bill." Id. As the committee explained, the expenditure of billions of dollars on an accounting "would not provide a single dollar to the plaintiffs[.]" Id.

The committee added that it would be "unwise to expend hundreds of millions of dollars on further accounting while this case is under appeal," id., and rejected "the notion that in passing the American Indian Trust Management Reform Act of 1994 Congress had any intention of ordering an accounting on the scale of that which has now been ordered" by the Court, id. at 117-

18. The committee stressed that "[s]uch an expansive and expensive undertaking would certainly have been judged to be a poor use of Federal and trust resources." Id. at 118.

Accordingly, as discussed above, Congress altered the governing law to provide that neither the 1994 Act nor any common law principles incorporated into federal law require DOI to commence or continue historical accounting activities with respect to the IIM accounts. At the same time, Congress "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 118; see H.R. 2691 (amounts "not to exceed $45,000,000 shall be available for records collection and indexing, imaging and coding, accounting for per capita and judgment accounts, accounting for tribal accounts, reviewing and distributing funds from special deposit accounts, and program management of the Office of Historical Trust Accounting, including litigation support").

As the Court of Appeals has made clear, the only actionable duty at issue in this suit is the duty to perform an accounting. The new legislation removes any arguable legal basis for this Court's injunction Order insofar as the injunction purports to enforce that duty. And to the extent that the injunction purports to enforce other duties that are not properly at issue in this suit at all, its ruling is plainly without basis.

B. The Court Had No Authority To Issue A Structural Injunction

Even if Congress had not acted, the Court's decision would be fundamentally unsound. The structural injunction effects an explicit judicial takeover of Interior's IIM trust program. The Order contravenes established limits on judicial review of executive branch action and would constitute clear error even if this suit concerned the full breadth of trust management issues and

even if the record reflected across-the-board failures of management. As the Court of Appeals has recognized, a party "'cannot seek wholesale improvement of [a] program by court decree,'" but must seek this kind of relief "'in the offices of the Department [of the Interior] or the halls of Congress, where programmatic improvements are normally made.'" 240 F.3d at 1095 (quoting Lujan v. National Wildlife Federation, 497 U.S. 871, 891 (1990)).

As the Court of Appeals also made clear, this suit is not (and could not be) a suit to enforce performance of all trust-related matters. Thus, the appellate court required this Court to amend its opinion to reflect the fact that the "actual legal breach is the failure to provide an accounting, not [the government's] failure to take the discrete individual steps that would facilitate an accounting." Id. at 1106. The appellate court further instructed this Court to be mindful of the limits of its jurisdiction, which would be confined to determining "whether in preparing to do an accounting the Department takes steps so defective that they would necessarily delay rather than accelerate the ultimate provision of an adequate accounting . . ." Id. at 1110. The ruling of the Court of Appeals left no room for "structural injunctions," much less overarching orders to "fix the system."

If this Court had, in fact, properly determined that some aspects of the Interior Accounting Plan were so defective as to cause delay, it could identify those errors. At that point, however, the Court's jurisdiction would end: The "guiding principle . . . is that the function of [a] reviewing court ends when an error of law is laid bare." Federal Power Commission v. Idaho Power Co., 344 U.S. 17, 20 (1952).

The rationale for this rule, which is undergirded by principles of separation of powers, is particularly clear in this case. How to "reform the trust" raises sweeping questions for both

Congress and Interior, questions that Congress is again addressing. It is for the political branches to determine what changes in law, asset allocation, or management techniques will best serve the interests of the beneficiaries and will make best use of limited resources (which, unlike in a private trust, are not provided by the trust itself but by the public fisc). This Court cannot, in effect, appropriate funds and direct their expenditure.

The Court's decision to enforce its injunction by means of a new "Judicial Monitor" and a team of "agents" underscores the nature of its takeover and constitutes independent error. The Court has no authority to give its "agents" "unlimited access" to government facilities and information and "the power to conduct confidential interviews" with government personnel. Order at 17. The creation of a new Monitor and agents pointedly disregards the Court of Appeals' ruling that such a role "is unknown to our adversarial legal system." Cobell v. Norton, 334 F.3d 1128, 1142 (D.C. Cir. 2003).

Finally, the record provides no basis for concluding that Interior has abdicated its trust responsibilities. Since the Court of Appeals' initial remand order, there have been two evidentiary proceedings– a contempt trial and the trial preceding issuance of the structural injunction. The evidence adduced at the 44-day trial conducted in the summer of 2003 confirms that Interior has continued to take significant steps in furtherance of both historical accounting and reform of trust administration. The Court cited no evidence demonstrating that the agency is defaulting on its responsibilities.

The Court's decision to wrest control of "trust reform" from Interior is, instead, based on the contempt trial, which was held in late 2001 and early 2002, following which the Court declared the Secretary of the Interior an "unfit" trustee-delegee. Although its contempt ruling

was vacated on appeal, the Court announced that it would treat the factual findings made in its contempt ruling as having been established because, in the Court's view, they had not been set aside by the Court of Appeals. See Op. at 23-24.

The Court's reasoning once more disregards the Court of Appeals' rulings. The Court of Appeals vacated this Court's rulings on all five specifications of contempt. See 334 F.3d at 1147-50. In so ruling, it made absolutely clear that the record provided no basis for calling into question the good faith or reasonable efforts of the present Secretary. To the contrary, the Court of Appeals declared that

> the district court's findings clearly indicate that in her first six months in office Secretary Norton took significant steps toward completing an accounting. By June 2001 the Secretary had contracted with EDS, a national consulting firm, to evaluate the status of the TAAMS project, and by November 2001 the Department had proposed a reorganization plan aimed at eliminating the problems EDS had identified. In July 2001 Secretary Norton created the Office of Historical Trust Accounting, which has since made significant progress toward completing an accounting. Hence, the Court Monitor stated in his Fifth Report, "[t]here is no doubt the OHTA has made more progress . . . in six months [July through December, 2001] than the past administration did in six years."

Id. at 1148 (citations omitted). In examining this Court's contempt ruling with respect to allegedly misleading statements regarding Interior's computer system, the Court of Appeals found this Court's reasoning "mystifying," id. at 1149, and described the contempt ruling on computer security as "inconceivable," id. at 1150. The earlier contempt trial thus could provide no possible basis for the Court's decision to assume responsibility for trust reform in general or for the accounting in particular.

C. The Court's Understanding Of DOI's Accounting Responsibilities Has At No Time Had A Basis In Law

As the history of both the 1994 Act and the most recent legislation demonstrate, the Court's redefinition of an "accounting" comports neither with congressional intent nor common sense.

As noted, the 1994 Act provides that "[t]he Secretary shall account for the daily and annual balance of all funds held in trust by the United States for the benefit of . . . an individual Indian which are deposited or invested pursuant to the Act of June 24, 1938 (25 U.S.C. 162a)." Pub. L. 103-412, § 102(a). The DOI Accounting Plan, built on years of concerted effort, fully complied with the Court of Appeals' understanding of that provision. The DOI Accounting Plan would provide a statement of all of the post-1938 transactions in each IIM account that was open in 1994 or thereafter, and for the verification of those transactions. See Accounting Plan at II-2, III-1. By examining every transaction of $5,000 and over, and by verifying the remaining transactions in the land-based accounts by use of statistical sampling, Interior's plan contemplated 99% confidence in the stated accuracy rate of the accounting statements. Id. at 1. Interior estimates that its plan would take 5 years and cost $335 million. Id.

Before the enactment of the 1994 Act, Congress noted that "it might cost as much as $281 million to $390 million to audit the IIM accounts at all 93 [Bureau of Indian Affairs] offices." H.R. Rep. No. 102-499, at 26 (Apr. 22, 1992). It 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." Id.

Even the DOI Accounting Plan raised the fiscal concern identified by Congress. The Court's ruling dismissed Congress's concern. The Court did not find that Interior's plan would fail to deliver the results contemplated in the DOI Accounting Plan or that the techniques on

which the plan would rely are unreliable. Instead, the Court redefined the accounting in ways that multiply its expense many times over while providing little if any discernible benefit to account holders. This point is crystallized by a brief examination of the more significant requirements imposed by the Court.

1. Parameters: Providing An Accounting For All Closed Accounts And For All Transactions Dating Back To 1887

The DOI Accounting Plan provided for an accounting to current account holders (and holders of accounts open in 1994) for funds deposited or invested pursuant to the 1938 Act. The structural injunction requires that Interior provide an accounting for all IIM accounts that have ever been in existence as far back as 1887, including those that have been closed for decades. See Op. at 159-63, 165. The Court's belief that its ruling was compelled by the 1994 Act is without basis. Congress had no need to specify that it wished to provide an accounting to current account holders and not to account holders long since deceased. Indeed, the Court's reading cannot be squared with the statute's provision that Interior account for "the daily and annual balance of all funds held in trust." Nor is it evident how any tangible benefit could be derived from the Court's mandatory revisiting of closed accounts.

The requirement that Interior account for transactions back to 1887 is similarly inexplicable. The 1994 Act provided for an accounting of funds "deposited or invested pursuant to the Act of June 24, 1938 (25 U.S.C. 162a)." Whatever the scope of Interior's accounting responsibility, no reading of the statute could plausibly compel an accounting of transactions that pre-date the 1938 statute.

2. Lands and Probate

The 1994 Act addressed an accounting for funds deposited or invested pursuant to the 1938 Act. The structural injunction Order requires a description of all land assets for each predecessor in interest of every current account holder. The Court's Order conflates land trust obligations under the General Allotment Act of 1887 with the accounting responsibilities at issue in this suit.

About 48% of the IIM trust money is held in the roughly 200,000 land-based IIM accounts, which contain funds derived from the roughly 10 million acres of land that the United States holds in trust for individual Indians. See DOI Accounting Plan at II-1, III-1. DOI manages revenue-producing activities on those lands, including oil and gas leases, farming and grazing, and timber harvesting. See id. at II-1. While approximately 10 million acres are currently held in trust, Interior estimates that the figure at the time of the 1887 Allotment Act and in the period thereafter was two to four times as large. See Cason Decl. at 8.

By requiring Interior to explore the land holdings of all predecessors in interest of IIM account holders, the Court has effectively required Interior to examine the holdings of related land interests of persons with no IIM accounts and to describe interests in land that has long ceased to be held in trust by the government. Since Interior must reconstruct every IIM account since 1887 and every land interest since 1887, and establish the relationships between predecessors and successors in interest to these assets since 1887, the injunction apparently requires Interior to revisit the substance of nearly every probate decision since 1887. Indeed, the Court's Order specifically instructs that probate decisions cannot be accorded conclusive effect with respect to the description of the estate at the time of probate and the amounts that should have been distributed. Op. at 165-68.

Moreover, the benefit to be derived from this expenditure is altogether unclear. Through heirship and marriage, the ownership interest in a single parcel of land is frequently split among many beneficiaries as it passes from generation to generation, so that a present beneficiary's ownership interest in a tract of land may be infinitesimally small. In such cases, compliance with the Court's requirement to account for a particular land holding may cost more than the underlying property interest is worth. See Cason Decl. at 8-9.

3. Accounting For Funds Never Held In IIM Accounts

Not all revenues generated by Indian trust lands are collected and managed by Interior. See DOI Accounting Plan at II-4. Some monies are paid directly to the Indian owner of the land by a third-party lessee. See id. The structural injunction requires Interior to provide an accounting for these direct payments from third parties, even though they were never held by the government at all, much less placed into an IIM account. See Op. at 172-76.

4. Statistical Sampling

In its initial decision, the Court of Appeals noted that this Court had properly "left open the choice of how the accounting would be conducted, and whether certain accounting methods, such as statistical sampling or something else, would be appropriate," explaining that these decisions are "properly left in the hands of administrative agencies." 240 F.3d at 1104. As Interior's accounting plan explains, the plan would produce, based on Interior's paper and electronic bookkeeping records, a ledger for each open IIM account that describes all of the post-1938 transactions in each account. Under the DOI Plan, sampling would not be used to generate the account statements. Sampling would be used only to verify the accuracy of the statement, consistent with accepted auditing practice. To verify the accuracy of the account statements for

the judgment and per capita accounts, the DOI Plan called for the examination of the relevant paper records (such as the underlying lease) for each transaction. The Plan provided for the same method of verification for transactions over $5,000 in the land-based IIM accounts. For transactions below $5,000, i.e., the category of transactions where sampling would be invoked, the Plan called for examination of statistically valid samples using a methodology that would provide 99% confidence in the stated accuracy rate of these transactions. See DOI Accounting Plan at 1.

The structural injunction, by contrast, requires the government to verify each transaction individually. (Although the Court suggested that Interior could use sampling to perform an audit function, the requirement that each transaction be individually verified would make any additional auditing superfluous.) This requirement dramatically expands the number of transactions to be individually examined. The vast majority of these transactions are for relatively small amounts. Thus, in many instances, the cost of verifying the transaction is likely to be greater than the entire amount of the transaction itself. See Cason Decl. at 4. In conjunction with the expanded scope of the accounting required (e.g., examining transactions prior to 1938), the costs imposed by the Court's requirement of individual transaction-by-transaction verification are estimated at approximately $6 billion. See id. at 7.

II. Balance Of Harms And The Public Interest

The Court's assessment of the costs and benefits of its structural injunction is flatly at odds with that of Congress, which has now altered the law regarding Interior's accounting duties and which is responsible for determining how public monies may be spent.

The DOI Plan would cost approximately $335 million. The current, total balance of the IIM accounts is about $415 million. The estimated cost of the structural injunction is at least $6 billion. See Cason Decl. at 5. As the Conference Report accompanying the new legislation emphasized, Congress 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. Congress observed that the reallocation of resources required by the structural injunction "would be devastating to Indian country and to the other programs in the Interior bill." Id. The Court sought to justify its injunction on the basis of the purported dependence of Indian beneficiaries on trust disbursements (see Op. at 102), but as the committee explained, the expenditure of billions of dollars on an accounting "would not provide a single dollar to the plaintiffs, and would without question displace funds available for education, health care and other services." H.R. Conf. Rep. 108-330, at 117.

As the recent legislation reflects, Congress is revisiting the issues related to an accounting of the IIM accounts. For now, Congress has "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 118. See H.R. 2691 (amounts "not to exceed $45,000,000 shall be available for records collection and indexing, imaging and coding, accounting for per capita and judgment accounts, accounting for tribal accounts, reviewing and distributing funds from special deposit accounts, and program management of the Office of Historical Trust Accounting, including litigation support").

The structural injunction imposes short deadlines for the submission by Interior of a host of detailed plans and other submissions encompassing every aspect of Interior's trust

responsibilities and beyond. These requirements force Interior in a direction opposite from that commanded by Congress. Congress has appropriated only $45 million for all accounting-related activities while it considers the appropriate parameters of an accounting, explaining that it has "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 118. The injunction requires the submission or implementation of plans based on legal premises that were incorrect before the most recent legislation, and that are flatly at odds with the new statute.

Moreover, as Associate Deputy Secretary Cason explains, even to comply with the more distant deadlines of the structural injunction would require DOI immediately to reallocate resources to perform tasks that would not have been required under the DOI Plan and are clearly outside the contemplation of Congress. For example, the Court's injunction requires verification of over 30 million transactions that pre-date the electronic records era. Any attempt to perform this task within the Court's time frame would require immediate and substantial expenditures on equipment and personnel that would ultimately yield little if anything of value to the public or account holders. See Cason Decl. at 12.

The performance of an accounting under the DOI Plan would not be advanced by performance of the tasks described in the injunction. As discussed above, the injunction requires a re-creation of all transactions related to funds and land from 1887 onwards as a condition for providing an accounting to current account holders. The Interior Plan, in contrast, would generally work backwards from the present, a method that would require different tasks in a different order and would allow completion of accounting for land-based accounts far in advance

of the very different accounting contemplated by the Court. Even the Court's most immediate deadline, dealing with collection of third-party records, reflects this fundamental divergence. Under the DOI Plan, Interior would first look to the millions of documents in its possession and then seek to fill any gaps by seeking information from third parties. Under the Court's Order, however, Interior would be forced to focus immediately on a detailed plan to obtain outside records including the use of potentially large numbers of subpoenas (see Order at 4). Such record-gathering would be largely unnecessary and extremely burdensome to third parties as well as Interior, costing the government alone an estimated sum in the hundreds of millions of dollars. See Cason Decl. at 10, 12.

The requirement that Interior file a detailed account of the tribal laws that it believes applicable is also illustrative. DOI consults with tribes regarding trust management, but has never subordinated the federal government's responsibilities to tribal jurisdiction. Indeed, the Complaint makes no allegation that the United States is acting in disregard of applicable tribal laws or ordinances. Nevertheless, the injunction would require DOI to devote immediate attention to the issue of how to respond to the Order with respect to the more than 500 separate tribal jurisdictions in the United States. See Cason Decl. at 11.

Finally, 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 at 17.

A stay will allow Interior to proceed with a number of significant steps in the preparation of statements of account for IIM account holders – steps that are intended to make concrete progress and that are consistent with Congress's recent enactment. These steps include

continuing the ongoing reconciliation of judgment accounts; continuing the ongoing reconciliation of per capita accounts, continuing the ongoing review and distribution of funds from special deposit accounts; continuing with ongoing efforts regarding tribal accounting; and continuing with ongoing records collection, indexing, imaging and coding activities. See Cason Decl. at 13.

In sum, the structural injunction marks an extraordinary usurpation of executive branch responsibility, without foundation in the record, based on a fundamental misunderstanding of the 1994 Act and the decisions of the Court of Appeals. The new legislation makes entirely clear that the duties reflected in the 1994 Act cannot be the basis for the historical accounting ordered by the Court, and makes equally clear that Congress regards the expenditure of funds required by the injunction as inimical to the interests of account holders as well as to the public generally. An immediate stay of the structural injunction is appropriate.

CONCLUSION

For all of the foregoing reasons, Defendants respectfully request that the Court enter an Order staying the structural injunction Order pending appeal.

Dated: November 10, 2003

Respectfully submitted,

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CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on November 10, 2003 I served the foregoing *Defendants' Motion to Stay the Court's Structural Injunction Pending Appeal* was served by Electronic Case Filing, and on the following who are not registered for Electronic Case Filing in the manner indicated:

Per the Court's Order of April 17, 2003,
by Facsimile

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
Plaintiffs,	)	
v.	)	Case No. 1:96CV01285
	)	(Judge Lamberth)
GALE NORTON, Secretary of the Interior, et al.,	)	
Defendants.	)	

ORDER

This matter comes before the Court on the Defendants' *Motion to Stay the Court's Structural Injunction Pending Appeal,* Dkt # _____. Upon consideration of the Motion, any Opposition, any Reply thereto, and the entire record of this case, it is hereby

ORDERED that the Motion should be and is hereby GRANTED, and it is further

ORDERED that the Order Issuing Structural Injunction of September 25, 2003 [Dkt # 2310] be stayed pending appeal.

SO ORDERED

_____
Hon. Royce C. Lamberth
UNITED STATES DISTRICT JUDGE
United States District Court for the
District of Columbia

Date:_____

cc:

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DECLARATION OF JAMES E. CASON IN SUPPORT OF MOTION FOR STAY PENDING APPEAL

I, James E. Cason, am the Associate Deputy Secretary of the U.S. Department of the Interior (Interior). In my capacity as Associate Deputy Secretary, I share authority and responsibility at the Secretarial level for the oversight and management of the Department's Indian trust and associated reform efforts. In this capacity, I rely upon information from Interior management and staff to make program management decisions or to prepare communications with the Court, as is the case with this declaration.

On September 25, 2003, the United States District Court issued a structural injunction directing Interior to undertake historical accounting and trust reform activities as specified by the court. As set forth below, the plan reflected in the court's injunctive order is dramatically different from the plans adopted by the Secretary of the Interior and with respect to which there has been significant progress made. Many of the steps called for in the injunction are impracticable, if not impossible, to perform at least within the time frames allowed. The injunction as a whole would be extraordinarily expensive to implement requiring even under the most optimistic assessment billions of dollars.

Background

As of December 31, 2000, the United States held a balance of approximately $416.2 million in Individual Indian Money (IIM) trust accounts. These funds are maintained in approximately 257,400 separate accounts – the IIM funds accounts that are the subject of this litigation. The amount of funds held in trust and the number of separate accounts may vary on a daily basis.

The IIM funds are maintained in three primary types of accounts: land-based accounts, judgment and per capita accounts, and special deposit accounts. See Historical

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Accounting Plan for Individual Indian Money Accounts (Interior Accounting Plan) at III-1 (Attachment 1).

As of December 31, 2000, about 48% of the IIM funds were held in about 193,800 land-based IIM accounts, which contain funds derived from some of the more than 10 million acres of land that the United States currently holds in trust for individual Indians. See Interior Accounting Plan at II-1, III-1. However, the land interests held by IIM account holders frequently represent a minuscule fraction of an acre, the result of repeated divisions of land interests (also referred to as "fractionation") pursuant to intestacy laws since 1887, when land first came to be held in trust for individual Indians. Based on FY 2001 data, the recurring lease income generated by these lands varies widely, but the overwhelming majority (about 96% of the 193,800 land-based accounts) of the accounts, receive less than $250 per year.

Leasing income is typically distributed to the account holder when the balance exceeds $15. However, at any given point in time, there are significant numbers of accounts in which balances accumulate without routine distribution. For example, funds may accumulate in accounts held on behalf of minors or persons otherwise not legally competent to manage their own affairs; accounts belonging to persons whose whereabouts are unknown; or accounts involved in pending probate proceedings.

As of December 31, 2000, about 36% of the IIM funds were held in about 42,200 judgment and per capita IIM accounts, which primarily contain funds derived from tribal distributions of litigation settlements and of tribal revenues, respectively. See id. at III-1.

As of December 31, 2000, about 16% of the IIM funds were held in about 21,400 special deposit accounts, which are intended to be temporary, administrative accounts for the deposit of funds that cannot immediately be credited to the rightful account holders or owners.

I. INTERIOR'S PLAN FOR AN HISTORICAL ACCOUNTING.

The 1994 Act provides that Interior "shall account for the daily and annual balance of all funds held in trust by the United States for the benefit of . . . an individual Indian 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), 108 Stat. 4240 (codified at 25 U.S.C. § 4011). The district court has ruled that to meet this obligation, Interior must produce a historical accounting of all funds ever held in IIM accounts or paid directly to IIM account holders by lessees.

Interior has taken a broad range of steps toward producing a historical accounting. Since the establishment of the Office of Historical Trust Accounting (OHTA) in July 2001, the Department has developed and begun implementing a plan that would provide an historical accounting for IIM trust funds to present to account holders within a reasonable time frame. In conjunction with OHTA's efforts, Interior engaged five public accounting

firms, the largest commercial trust operator in the United States, two historian firms specializing in Indian issues, and firms to assist in statistical issues, trust legal matters and other pertinent areas. See Interior Accounting Plan at 2; id. at I-1, I-2. In total, about $53 million has been obligated to date for activities associated with producing a historical accounting.

As of September 30, 2003, Interior has performed an accounting for 17,376 judgment accounts with balances totaling almost $50 million (about 90% have completed the quality control process). As of September 30, 2003, Interior has made progress with per capita accounts by reconciling 122,603 transactions, involving approximately $163,000,000 (balance and throughput - see discussion below). As of September 30, 2003, for 2,303 special deposit accounts with balances totaling over $10 million, Interior had completed its accounting and either closed the account, converted the account to a proper account type, or had residual balances in the account distributed to the proper parties.

In January 2003, Interior submitted its Historical Accounting Plan for Individual Indian Money Accounts to the district court. Some of the principal features of the Plan, which is Attachment 1 to this declaration, are these:

A. Accounting.

The accounting involves two interrelated aspects of the IIM funds: (1) accounting for the balance of the accounts (i.e., how much money is in an account at any specific point in time); and, (2) accounting for throughput in the accounts (i.e., funds flowing through an account, over time, that affect the balance of the account).

Interior estimates that approximately $13 billion has flowed into these IIM accounts (since 1887) and about $12.6 billion has been distributed from these accounts, leaving an overall balance of $416.2 million as of December 31, 2000.

The $416.2 million balance is composed of the balances in the 257,400 underlying accounts that were open as of December 31, 2000. To ensure that the IIM account balances are accurate, the Interior plan would reconstruct each account to reflect the opening balance (June 24, 1938 or after), subsequent receipts and disbursements (throughput), and ending balance.

Interior estimates that, under its plan, there would be approximately 31 million transactions (receipts and disbursements) to be compiled for these accounts. The Interior Plan would provide to each account holder, with an account open on October 25, 1994 or thereafter, a statement detailing, on a transaction-by-transaction basis (i.e., opening deposit, subsequent deposits and disbursements and ending balance) the account's history going back to 1938 or the inception of the account, whichever is later. As a separate, but coordinated effort, Interior planned to verify the accuracy of transactions by reviewing underlying support documentation.

B. Verification Methodology.

The Plan specified the mechanisms Interior would use to verify the accuracy of the transactions associated with each account. Verification means identifying and reviewing the documentation (e.g., checks, journal vouchers, leases, etc.) supporting transactions to ensure that the transaction amount was accurate and correctly reflected in the history of the account.

For the approximately 42,000 Judgment and Per Capita IIM accounts, Interior planned to examine the relevant electronic and paper records to verify all of the transactions in each account. For the approximately 21,400 special deposit accounts, Interior planned to use a similar approach.

For the approximately 193,800 land-based IIM accounts, Interior planned to use another verification approach. For the transactions of $ 5,000 or more, Interior planned to use relevant electronic and paper records to verify each transaction (total of about 173,000). Interior estimates, based on electronic records, that the transactions in this stratum represent about 0.3% of the total number of transactions and about 45% of the throughput.

For the strata between $500 and $5000 (estimated at 3% of transactions and 30% of the throughput) and between $0 and $500 (estimated at 96.7% of the transactions and 25% of the throughput), Interior planned to verify the accuracy of transactions on IIM account ledgers by reviewing the underlying support documentation of a statistically selected sample of transactions. The statistically selected sample (of about 320,000) was designed, by experts retained by Interior, to provide a 99% level of confidence that the error rate (if any) identified by the historical accounting process was accurate for the strata.

For land-based transactions, the statistical selection of transactions was proposed as a cost effective, expeditious and accurate alternative to transaction-by-transaction verification. Significantly, for the stratum $0 to $500, Interior estimates that the average cost of accounting, per transaction, exceeds the average dollar value of the transactions in the stratum.

For the land-based accounts, the use of a statistical approach to select transactions for verification has an enormous impact on costs. The statistical experts projected that only about 500,000 of the transactions, out of the estimated 31 million transactions associated with these accounts, would need to be verified to achieve the 99% level of confidence mentioned above.

C. Time Frame.

The Plan called for the completion of the accounting within five years (September 30, 2007).

D. Cost.

The estimated cost of the Interior plan was $335 million. The availability of sufficient funds is subject to congressional appropriations, as discussed in more detail below.

II. THE STRUCTURAL INJUNCTION - HISTORICAL ACCOUNTING

The structural injunction differs from the Interior plan in the following significant respects:

The injunction requires an accounting for the accounts of deceased beneficiaries and other closed accounts, and requires an accounting for transactions dating back to 1887. Interior currently estimates that this would roughly double the number of transactions to be compiled (from about 31 million to about 61 million), but this estimate may be too conservative.

The injunction requires that every transaction be verified individually. Interior currently estimates that the injunction would require the verification of the supporting documentation for about 61 million transactions, rather than the about 500,000 transactions to be verified under the Interior plan.

By at least doubling the number of transactions to be considered and precluding the use of statistical sampling to verify the accuracy of account transactions, Interior currently estimates that the injunction would add approximately $7.9 billion in cost above that envisioned for the Interior Plan.

The injunction requires an accounting of land interests held in trust for individual Indians pursuant to the General Allotment Act of 1887 in addition to an accounting for funds transactions post-1938. Interior currently estimates that this requirement would add approximately $1 billion in costs.

Interior's analysis of the projected costs for implementing the structural injunction incorporates several assumptions, including but not limited to, transaction numbers, time to conduct discrete activities, blended average costs for the skill types needed for the various tasks, numbers of allotments and fractionation, and relevant supporting document volumes, both within Interior and residing with third parties. The analysis suggests a range of possible costs between approximately $6 billion (an optimistic view of costs and workload) to $14 billion (a conservative view of costs and workload), with an estimated mid-range likelihood cost of approximately $9.5 billion. The cost estimates presented herein are associated with Interior's estimates at the expected median and are helpful for order-of-magnitude type comparisons.

A. IIM Transactions To Be Accounted For.

The Interior Plan proposed to provide an accounting of transactions in accounts open as of October 1994 or thereafter, including all transactions in those accounts post 1938. This accounting would encompass approximately 31 million transactions.

Based on current estimates, which, as noted above, may be too conservative, the structural injunction approximately doubles the number of transactions that would have been accounted for under the Interior Plan. This results from two aspects of the injunction. First, the injunction, unlike the Interior Plan, requires an accounting for closed accounts - the accounts of beneficiaries who had died prior to 1994 and the accounts closed prior to 1994 for reasons other than death. Second, the injunction requires Interior to account for all funds placed in IIM accounts, or paid directly to individual Indians, from 1887 to the present, including transactions prior to the 1938 Act.

While the injunction at least doubles the estimated number of transactions to be accounted for, it increases the cost of the accounting many times over. The increase in cost results, in significant part, from the fact that the 31 million transactions addressed by the Interior Plan are predominantly more recent and less expensive to account for. Approximately 70% of the IIM accounts open in October 1994 or opened thereafter were opened in the period in which IIM accounts have been managed by computer. Of the 31 million transactions to be covered by the Interior Plan, approximately 26.5 million transactions are reflected in computerized databases. It would still be necessary, under the Interior Plan, to provide an accounting for about 4.5 million transactions on the basis of paper records. Also, under Interior's sampling approach, only about 500,000 transactions would need to be verified, and the samples selected would be encompass both electronic records-based and paper records-based transactions.

Virtually all of the 30 million additional transactions added by the structural injunction would require Interior to resort to the use of paper records. To conduct the accounting and verification activities required by the structural injunction, Interior would need to review an estimated 500-600 million pages of internal documents and an as yet unknown volume of records to be obtained from third parties to identify records relevant to the historical accounting effort. Then, Interior would need to index and/or image an estimated 250 million pages of relevant, internal documents and organize (code) the information for use by accountants to compile account histories and verify transaction accuracy. In addition, Interior is directed to pursue additional records from third parties.

B. Verification Of IIM Transactions.

Under the structural injunction, Interior must undertake to verify individually the accuracy of all of the estimated 61 million transactions, dating back to 1887, by reconciling each transaction, regardless of the amount, to the underlying documentation. As discussed

above, with respect to land-based accounts, the Interior Plan would rely on statistical sampling to verify transactions under $5,000.

The statistical experts retained by Interior projected that the sampling verification procedure incorporated within Interior's plan would provide a 99% assurance of accuracy within specified error rates. Further, the statistical experts did not believe that the requirement to reconcile each transaction individually would result in any appreciable increase in Interior's ability to accurately determine the error rate (if any) associated with the historical accounting of IIM trust funds.

By expanding the scope of the accounting and prohibiting the use of a statistically-based verification process, the structural injunction has increased the estimated cost of the historical accounting of IIM funds by approximately $7.9 billion over that proposed under the Interior Plan ($8.2 billion less $335 million). This estimate is based on three main components, records preparation, the accounting process, including transaction verification and other associated costs

The historical accounting requires that Interior collect documents to support the transaction reconciliation. Interior estimates that, in addition to the records available, approximately 12 million more internal government documents would need to be located and collected. Interior estimates it would take, on average, about three-quarters of an hour per document to find the needed records, which at a blended cost per hour of $70 means that Interior would spend about $630 million locating and collecting records. In addition, Interior estimates that it would need to make electronic images of at least 250 million pages (including the necessary coding so that these images can be recovered when needed). It would cost another almost $450 million to turn these records into searchable electronic images, or about $1.80 per image (including scanning, digitizing, and coding). Therefore, this stage would cost about $1.1 billion, plus the cost associated with third party records.

The financial accountants can begin their work when the underlying records are imaged and available in the Accounting Reconciliation Tool (ART) system. Interior estimates that there have been 61 million transactions since 1887 that the accountants would need to examine. Each transaction, on average, requires locating four supporting documents. Interior estimates that it would take, on average, 1 hour to complete all the steps needed to reconcile a transaction, including assigning and tracking the transaction; locating, analyzing and confirming the supporting documents in ART; contracting firm and independent firm quality control review; and, final acceptance review by Interior. At an average cost of $100 per accountant hour, reconciliation of 61 million transactions is estimated to cost $6.1 billion.

There are othr costs that Interior estimates would be incurred in undertaking the historical accounting beyond records preparation and transactions reconciliation. These costs include: system accounting tests; examining tract ownership at the time of a collection transaction to confirm that the right owner was paid the correct amount; other information technology requirements; the preparation and reporting of Historical Account Statements;

administration, facilities and logistical support costs; escheatment (Youpee) accounting; and completing the probate backlog. In total, these other costs add another approximately $1 billion.

C. Accounting For Land Allotments Under the 1887 Act.

The structural injunction also requires a detailed assessment of land interests held by individual Indians in allotments pursuant to the General Allotment Act of 1887.

The injunction requires that Interior include in its Historical Statement of Account (Statement) to each living account holder "a description of the assets belonging to each living beneficiary of the Trust . . . and a description of the changes to the assets belonging to each living beneficiary." This would require Interior to identify each asset in which the living beneficiary may have had an ownership interest during the life of his or her account and to describe the changes to those assets during the life of the account.

The injunction also requires that Interior include in its Statement to each living account holder, a description of the assets belonging to his predecessors in interest and of all changes to those assets. This would require Interior to research and describe the history of all land ownership interests held at any time by a living account holder's predecessors in interest, regardless of whether those interests are related in any way to the interests now or ever held by the living account holder. In other words, Interior would have to research and describe not just the chain of title of any land ownership interests that a living beneficiary might have had or have, but also the chain of title of any land ownership interest that any of the living beneficiary's predecessors in interest might have had.

More than 10 million acres remain in individual Indian ownership at this time. Interior estimates that two to four times as many acres were allotted since 1887. To comply with the injunction, Interior would have to trace the ownership of each allotted parcel from 1887 or the original allotment date. It bears emphasis that, apart from any other issues, this effort would involve, in significant part, lands with respect to which Interior no longer has trust responsibility.

Because of intestacy laws, marriage and other factors, the ownership interest in a single parcel of land is frequently split (as undivided interests) among many beneficiaries as it passes from generation to generation, so that a present beneficiary's ownership interest in a tract of land may vary from infinitesimally small to 100%.

For example, consider a tract identified in 1987 in Hodel v. Irving, 481 U.S. 704, 713 (1987):

> Tract 1305 is 40 acres and produces $1,080 in income annually. It is valued at $8,000. It has 439 owners, one-third of whom receive less than $0.05 in annual rent and two-thirds of whom receive less than $1. The largest interest holder receives $82.85 annually. The common denominator used to compute fractional interests in

the property is 3,394,923,840,000. The smallest heir receives $.01 every 177 years. If the tract were sold (assuming all 439 owners could agree) for its estimated $8,000 value, he would be entitled to $0.000418. The administrative costs of handling this tract are estimated by the Bureau of Indian Affairs at $17,560 annually.

Today, this tract produces $2,000 in income annually and is valued at $22,000. It now has 505 owners, but the common denominator used to compute fractional interests has grown to 220,670,049,600,000. If the tract were sold (assuming the 505 owners could agree) for its estimated $22,000 value, the smallest heir would now be entitled to $0.00001824.

Complying with the structural injunction's requirement to account for all land assets held by any beneficiary or predecessor in interest will require two basic steps - assembling the entire ownership history of each tract of land allotted to individual Indians since 1887 and then identifying all of the tracts of land in which each individual Indian or his/her predecessors had an interest during the past 115 years. Interior estimates that it would take, on average, about 10 days to compile all of the ownership history for each allotment. At a blended cost of $ 85/researcher hour and assuming about 150,000 allotments, this effort would cost approximately $1 billion. In addition, Interior estimates that it will take approximately one day of research time to identify all of the tracts in which a unique individual Indian (or predecessors) has an interest. The total cost of this effort would depend upon the number of Indians receiving a report. For the approximately 200,000 current IIM accounts receiving land-based income, this effort would cost about $135 million.

D. Probate.

Given the requirements of the structural injunction to reconstruct every IIM account since 1887 and every land interest since 1887 and to establish the relationships between predecessors and successors in interest to these assets since 1887, it appears that the injunction would require Interior to reconsider most of the probate decisions made since 1887. The district court's order specifically instructs that Interior must include in its historical accounting all transactions that occurred during the lives of former IIM beneficiaries who are now deceased.

E. Accounting For Funds That Were Never Placed in IIM Accounts.

Not all revenues generated from trust lands are required to be collected by Interior and placed in IIM accounts — i.e., placed in trust. Under certain circumstances, individual Indians may arrange to be paid directly by the lessees of their trust lands. Interior's plan explained that it did not intend to account for such funds, which were "paid directly to the Indian owner of the land without ever coming into Interior's possession," Interior Accounting Plan at II-4, and were, therefore, never placed into an IIM account to which the accounting obligation applies.

The structural injunction, however, requires Interior to account for all such "direct pay" transactions, dating back to 1887. Thus, Interior is directed to reconstruct the activities of individual Indians and third party lessees with respect to trust lands for a period of up to 115 years. Interior's ability to perform this task is severely limited given that Interior was not a party to the exchange of funds being made pursuant to these direct pay relationships and therefore did not routinely receive any records of direct pay transactions. Indeed, in many cases, Interior would not even be aware of the direct pay activity and would rely on the individual Indian lessee to report any non-payment and to request enforcement assistance.

Under the most optimistic scenario, Interior believes that compliance with this aspect of the district court's injunction would prove to be impracticable, if not impossible. It is difficult to estimate discrete costs for this task; whatever information that can be gathered may be produced by the efforts to obtain third party records as described further below.

F. Third Party Records.

Interior estimates that there may be as many as 600 million pages of documents in its possession from which about 250 million may be relevant for historical accounting purposes. Interior had planned to use these internal documents first, then determine specific instances where internal information was not available, and on that basis attempt to collect any relevant information from third parties that might be helpful in performing the historical accounting.

Under the structural injunction, however, Interior must immediately formulate a program for the preservation of third party records, through, among other things, the use of subpoenas.

Interior believes that relevant records are likely to be retained by the approximately 200,000 IIM account holders (with accounts open on or after 10/25/94) and the estimated 300,000 - 500,000 former account holders or their families (with accounts closed prior to 10/25/94). Similarly, federally recognized tribes (of which there are 562) may possess relevant records.

In addition, relevant records may be found in the possession of all natural resource companies (e.g., oil, gas, coal, mining, timber, etc.) that have conducted business with individual Indians during the past 115 years. Records may also be in the possession of utilities, banks and other financial institutions, state, county and municipal agencies, colleges and universities with records collections, professional organizations and societies with records collections and law firms that have been involved with the management of individual Indian trust assets.

The effort and cost required to comply with this requirement is unclear. The number of documents to be preserved or obtained is not determined. Nonetheless, the use of a large number of subpoenas to preserve or obtain third party records will likely require substantial resources. If Interior is required to undertake a thorough effort to preserve or

obtain all possible records that might be relevant to the historical accounting required by the court, Interior estimates that the requirement the cost would range in the hundreds of millions of dollars.

III. THE STRUCTURAL INJUNCTION - FIXING THE SYSTEM

A. On March 28, 2003, Interior provided the district court with a copy of its Comprehensive Trust Management Plan (Comprehensive Plan). The Comprehensive Plan was prepared by Interior as an integrated description of various ongoing or planned trust reform efforts that includes all aspects of Interior's trust management program, including both tribal and individual Indian initiatives.

One significant effort described in the Comprehensive Plan involves the re-engineering of Interior's trust business processes, also referred to as the To-Be model. Interior noted that it would take about 14 months to delineate the re-engineering plan (circa May 31, 2004). The structural injunction requires Interior to complete its re-engineering plan by March 31, 2004.

The Comprehensive Plan noted that "implementation of the To-Be model will not be a simple task and will take place over a number of years. Implementation (emphasis added) will require multiple efforts and phases, spanning many DOI organizational entities." (Plan at 6.3.4.3)

The Court, however, has ordered Interior to fully implement the re-engineering of trust business processes by May 31, 2005. Thus, under the injunction, implementation must occur in fourteen months rather than the period of years contemplated by the Comprehensive Plan. Because the re-engineering plan was not even scheduled to be completed until May 2004, it is impossible to estimate at this time what the precise implementation costs of that plan would be. Interior intended to be timely, but deliberate, in its decisions regarding implementation of the re-engineering plan and had planned to follow normal budget processes to obtain funding for implementation.

The Court also ordered Interior to file with the Court within 90 days (by December 24, 2003) of its Order "a detailed plan of measures it will take to correct the problems with the leasing, title, and accounting systems of the Trust identified by NCAI (National Congress of American Indians) in its amicus brief." This information is being generated as part of the trust business process re-engineering project currently due to be completed in May 2004.

B. In addition, the Court concluded that "the rules of law applicable to the administration of the IIM trust include tribal law and ordinances." Accordingly, it has ordered Interior to file with the Court by January 24, 2004 "a list of tribal laws and ordinances that the Interior defendants deem applicable to the administration of the Trust. The list shall include a full statement of the manner in which the Interior defendants consider these laws and ordinances to affect such administration."

While Interior consults with tribes regarding trust management, Interior has not agreed to subject itself to tribal laws and ordinances. Interior does consider, pursuant to regulation, relevant tribal laws and ordinances when taking certain Departmental actions (e.g., factors relevant to lease approvals). There are 562 separate, federally recognized tribes in the United States, each with the potential to establish its own set of laws and ordinances. Wholly apart from any other issues, complying with the injunction's requirements pertaining to tribal laws and ordinances before January 24, 2004 will be an substantial undertaking that will divert limited resources from historical accounting work.

IV. THE IMMEDIATE IMPACT OF THE INJUNCTION.

A. The court's order effectively requires Interior to identify and audit individually all fund and land transactions since 1887 as a predicate for providing account statements to current account holders. In contrast, the Interior Plan would proceed from the present backwards, generally identifying and auditing the electronic records era transactions before reviewing the paper records era transactions.

To perform the accounting, verification, land title and other tasks required by the structural injunction, Interior would need to identify, index, image and organize the relevant paper records from an estimated 500-600 million pages of internal documents and an as yet unknown volume of paper records to be obtained as a product of issuing subpoenas to third parties who may have relevant information. As noted above, Interior estimates that the cost of preparing all of the relevant, internal documents for the accounting process would be approximately $1.1 billion, plus the cost associated with third party records. If Interior were required to meet the injunction's requirements, especially within the specified time frames, it would be necessary to add thousands of Interior or contractor employees and obtain thousands of additional computers with associated equipment.

The injunction includes many deadlines that are scheduled to go into effect within 60, 90 or 120 days. These cover a broad array of plans and plan implementation steps or other discrete actions. The preparation of the various responsive documents would consume a very significant amount of scarce resources within Interior.

Further, the dramatic differences between the views of the Court and Congress, place Interior in an untenable position regarding the formulation of plans that will be potentially acceptable and responsive to both. The court's order requires Interior to develop detailed plans for activities that, at least to date, Congress has indicated it will not fund. It is unclear how the agency can properly prepare a detailed plan based on premises that Congress has not been willing to accept.

For example, by December 24, 2003, Interior must file a detailed timetable for completion of the historical accounting, including specified dates for important milestones, including completion of the collection process, accounting process, and reporting process. Congress has made clear it will not fund the accounting ordered by the district court. But

Interior is nevertheless required to submit a detailed plan for complying with the injunction while taking action toward meeting the order's long term goals.

B. The FY 2004 Interior Appropriations statute provides:

> [N]othing in the American Indian Trust Fund Management Reform Act, Pub. L. No. 103-412 or in any other statute, and no principle of common law, shall be construed or applied to require the Department of the Interior to commence or continue historical accounting activities with respect to the Individual Indian Money Trust until the earlier of the following shall have occurred:
>
> > (a) Congress shall have amended the American Indian Trust Fund Management Reform Act to delineate the specific historical accounting obligations of the Department of the Interior with respect to the Individual Indian Money Trust; or
> >
> > (b) December 31, 2004.

C. In the FY 2003 budget, Congress provided less than $20 million to fund historical accounting activities. For FY 2004, Interior requested $130 million ($100 million for IIM accounts and $30 million for tribal accounts) to implement Interior's historical accounting plan. Congress provided a total of $45 million, for FY 2004, and specified the activities to undertaken. The relevant appropriations language states:

> *Provided*, That of the amounts available under this head not to exceed $45,000,000 shall be available for records collection and indexing, imaging and coding, accounting for per capita and judgment accounts, accounting for tribal accounts, reviewing and distributing funds from special deposit accounts, and program management of the Office of Historical Trust Accounting, including litigation support.

D. If the injunction is stayed pending appeal, Interior plans to proceed with significant accounting-related activities, including:

- Continue the reconciliation of judgment accounts;
- Continue the reconciliation of per capita accounts;
- Continue reviewing and distributing funds from special deposit accounts;
- Continue efforts to address tribal accounting requirements; and,
- Continue records collection, indexing, imaging, and coding.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge. Executed on November 10, 2003.

James E Cason

James E. Cason

H. R. 2691

One Hundred Eighth Congress of the United States of America

AT THE FIRST SESSION

Begun and held at the City of Washington on Tuesday, the seventh day of January, two thousand and three

An Act

Making appropriations for the Department of the Interior and related agencies for the fiscal year ending September 30, 2004, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the Department of the Interior and related agencies for the fiscal year ending September 30, 2004, and for other purposes, namely:

TITLE I—DEPARTMENT OF THE INTERIOR

BUREAU OF LAND MANAGEMENT

MANAGEMENT OF LANDS AND RESOURCES

For necessary expenses for protection, use, improvement, development, disposal, cadastral surveying, classification, acquisition of easements and other interests in lands, and performance of other functions, including maintenance of facilities, as authorized by law, in the management of lands and their resources under the jurisdiction of the Bureau of Land Management, including the general administration of the Bureau, and assessment of mineral potential of public lands pursuant to Public Law 96–487 (16 U.S.C. 3150(a)), $850,321,000, to remain available until expended, of which $1,000,000 is for high priority projects, to be carried out by the Youth Conservation Corps; $2,484,000 is for assessment of the mineral potential of public lands in Alaska pursuant to section 1010 of Public Law 96–487; (16 U.S.C. 3150); and of which not to exceed $1,000,000 shall be derived from the special receipt account established by the Land and Water Conservation Act of 1965, as amended (16 U.S.C. 460l–6a(i)); and of which $3,000,000 shall be available in fiscal year 2004 subject to a match by at least an equal amount by the National Fish and Wildlife Foundation for cost-shared projects supporting conservation of Bureau lands; and such funds shall be advanced to the Foundation as a lump sum grant without regard to when expenses are incurred; in addition, $32,696,000 is for Mining Law Administration program operations, including the cost of administering the mining claim fee program; to remain available until expended, to be reduced by amounts collected by the Bureau and credited to this appropriation from annual mining claim fees so as to result in a final appropriation estimated at not more than $850,321,000; and $2,000,000, to remain available until expended, from communication site rental

EXHIBIT B
Defendants' Motion for Stay Pending Appeal

annual financial statement of the Department of the Interior bureaus and offices funded in this Act.

OFFICE OF SPECIAL TRUSTEE FOR AMERICAN INDIANS

FEDERAL TRUST PROGRAMS

For the operation of trust programs for Indians by direct expenditure, contracts, cooperative agreements, compacts, and grants, $189,641,000, to remain available until expended: *Provided,* That of the amounts available under this heading not to exceed $45,000,000 shall be available for records collection and indexing, imaging and coding, accounting for per capita and judgment accounts, accounting for tribal accounts, reviewing and distributing funds from special deposit accounts, and program management of the Office of Historical Trust Accounting, including litigation support: *Provided further,* That nothing in the American Indian Trust Management Reform Act of 1994, Public Law 103–412, or in any other statute, and no principle of common law, shall be construed or applied to require the Department of the Interior to commence or continue historical accounting activities with respect to the Individual Indian Money Trust until the earlier of the following shall have occurred: (a) Congress shall have amended the American Indian Trust Management Reform Act of 1994 to delineate the specific historical accounting obligations of the Department of the Interior with respect to the Individual Indian Money Trust; or (b) December 31, 2004: *Provided further,* That funds for trust management improvements and litigation support may, as needed, be transferred to or merged with the Bureau of Indian Affairs, "Operation of Indian Programs" account; the Office of the Solicitor, "Salaries and Expenses" account; and the Departmental Management, "Salaries and Expenses" account: *Provided further,* That funds made available to Tribes and Tribal organizations through contracts or grants obligated during fiscal year 2004, as authorized by the Indian Self-Determination Act of 1975 (25 U.S.C. 450 et seq.), shall remain available until expended by the contractor or grantee: *Provided further,* That notwithstanding any other provision of law, the statute of limitations shall not commence to run on any claim, including any claim in litigation pending on the date of the enactment of this Act, concerning losses to or mismanagement of trust funds, until the affected tribe or individual Indian has been furnished with an accounting of such funds from which the beneficiary can determine whether there has been a loss: *Provided further,* That notwithstanding any other provision of law, the Secretary shall not be required to provide a quarterly statement of performance for any Indian trust account that has not had activity for at least 18 months and has a balance of $1.00 or less: *Provided further,* That the Secretary shall issue an annual account statement and maintain a record of any such accounts and shall permit the balance in each such account to be withdrawn upon the express written request of the account holder: *Provided further,* That not to exceed $50,000 is available for the Secretary to make payments to correct administrative errors of either disbursements from or deposits to Individual Indian Money or Tribal accounts after September 30, 2002: *Provided further,* That erroneous payments that are recovered shall be credited to and remain available in this account for this purpose.

108TH CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
1st Session } { 108–330

MAKING APPROPRIATIONS FOR THE DEPARTMENT OF THE INTERIOR AND RELATED AGENCIES FOR THE FISCAL YEAR ENDING SEPTEMBER 30, 2004, AND FOR OTHER PURPOSES

OCTOBER 28, 2003.—Ordered to be printed

Mr. TAYLOR of North Carolina, from the committee of conference, submitted the following

CONFERENCE REPORT

[To accompany H.R. 2691]

The committee of conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 2691) "making appropriations for the Department of the Interior and related agencies for the fiscal year ending September 30, 2004, and for other purposes", having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the House recede from its disagreement to the amendment of the Senate, and agree to the same with an amendment, as follows:

In lieu of the matter stricken and inserted by said amendment, insert:

That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the Department of the Interior and related agencies for the fiscal year ending September 30, 2004, and for other purposes, namely:

TITLE I—DEPARTMENT OF THE INTERIOR

BUREAU OF LAND MANAGEMENT

MANAGEMENT OF LANDS AND RESOURCES

For necessary expenses for protection, use, improvement, development, disposal, cadastral surveying, classification, acquisition of easements and other interests in lands, and performance of other functions, including maintenance of facilities, as authorized by law, in the management of lands and their resources under the jurisdiction of the Bureau of Land Management, including the general administration of the Bureau, and assessment of mineral potential of public lands pursuant to Public Law 96–487 (16 U.S.C. 3150(a)),

PAYMENTS IN LIEU OF TAXES

For expenses necessary to implement the Act of October 20, 1976, as amended (31 U.S.C. 6901–6907), $227,500,000, of which not to exceed $400,000 shall be available for administrative expenses: Provided, That no payment shall be made to otherwise eligible units of local government if the computed amount of the payment is less than $100.

OFFICE OF THE SOLICITOR

SALARIES AND EXPENSES

For necessary expenses of the Office of the Solicitor, $50,374,000.

OFFICE OF INSPECTOR GENERAL

SALARIES AND EXPENSES

For necessary expenses of the Office of Inspector General, $38,749,000, of which $3,812,000 shall be for procurement by contract of independent auditing services to audit the consolidated Department of the Interior annual financial statement and the annual financial statement of the Department of the Interior bureaus and offices funded in this Act.

OFFICE OF SPECIAL TRUSTEE FOR AMERICAN INDIANS

FEDERAL TRUST PROGRAMS

For the operation of trust programs for Indians by direct expenditure, contracts, cooperative agreements, compacts, and grants, $189,641,000, to remain available until expended: Provided, That of the amounts available under this heading not to exceed $45,000,000 shall be available for records collection and indexing, imaging and coding, accounting for per capita and judgment accounts, accounting for tribal accounts, reviewing and distributing funds from special deposit accounts, and program management of the Office of Historical Trust Accounting, including litigation support: Provided further, That nothing in the American Indian Trust Management Reform Act of 1994, Public Law 103–412, or in any other statute, and no principle of common law, shall be construed or applied to require the Department of the Interior to commence or continue historical accounting activities with respect to the Individual Indian Money Trust until the earlier of the following shall have occurred: (a) Congress shall have amended the American Indian Trust Management Reform Act of 1994 to delineate the specific historical accounting obligations of the Department of the Interior with respect to the Individual Indian Money Trust; or (b) December 31, 2004: Provided further, That funds for trust management improvements and litigation support may, as needed, be transferred to or merged with the Bureau of Indian Affairs, "Operation of Indian Programs" account; the Office of the Solicitor, "Salaries and Expenses" account; and the Departmental Management, "Salaries and Expenses" account: Provided further, That funds made available to Tribes and Tribal organizations through contracts or grants obligated during fiscal year 2004, as authorized by the Indian Self-Determination Act

of 1975 (25 U.S.C. 450 et seq.), shall remain available until expended by the contractor or grantee: Provided further, That notwithstanding any other provision of law, the statute of limitations shall not commence to run on any claim, including any claim in litigation pending on the date of the enactment of this Act, concerning losses to or mismanagement of trust funds, until the affected tribe or individual Indian has been furnished with an accounting of such funds from which the beneficiary can determine whether there has been a loss: Provided further, That notwithstanding any other provision of law, the Secretary shall not be required to provide a quarterly statement of performance for any Indian trust account that has not had activity for at least 18 months and has a balance of $1.00 or less: Provided further, That the Secretary shall issue an annual account statement and maintain a record of any such accounts and shall permit the balance in each such account to be withdrawn upon the express written request of the account holder: Provided further, That not to exceed $50,000 is available for the Secretary to make payments to correct administrative errors of either disbursements from or deposits to Individual Indian Money or Tribal accounts after September 30, 2002: Provided further, That erroneous payments that are recovered shall be credited to and remain available in this account for this purpose.

INDIAN LAND CONSOLIDATION

For consolidation of fractional interests in Indian lands and expenses associated with redetermining and redistributing escheated interests in allotted lands, and for necessary expenses to carry out the Indian Land Consolidation Act of 1983, as amended, by direct expenditure or cooperative agreement, $21,980,000, to remain available until expended: Provided, That funds provided under this heading may be expended pursuant to the authorities contained in the provisos under the heading "Office of Special Trustee for American Indians, Indian Land Consolidation" of the Interior and Related Agencies Appropriations Act, 2001 (Public Law 106–291).

NATURAL RESOURCE DAMAGE ASSESSMENT AND RESTORATION

NATURAL RESOURCE DAMAGE ASSESSMENT FUND

To conduct natural resource damage assessment and restoration activities by the Department of the Interior necessary to carry out the provisions of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended (42 U.S.C. 9601 et seq.), Federal Water Pollution Control Act, as amended (33 U.S.C. 1251 et seq.), the Oil Pollution Act of 1990 (Public Law 101–380) (33 U.S.C. 2701 et seq.), and Public Law 101–337, as amended (16 U.S.C. 19jj et seq.), $5,633,000, to remain available until expended.

ADMINISTRATIVE PROVISIONS

There is hereby authorized for acquisition from available resources within the Working Capital Fund, 15 aircraft, 10 of which shall be for replacement and which may be obtained by donation, purchase or through available excess surplus property: Provided, That existing aircraft being replaced may be sold, with proceeds derived or trade-in value used to offset the purchase price for the re-

OFFICE OF SPECIAL TRUSTEE FOR AMERICAN INDIANS

FEDERAL TRUST PROGRAMS

The conference agreement provides $189,641,000 for Federal trust programs instead of $219,641,000 as proposed by both the House and the Senate.

Changes to the House include a shift of $981,000 from program operation, support, and improvements into executive direction and a reduction of $30,000,000 for the historical accounting project.

The Department of the Interior's July 2, 2002, report to Congress detailed the cost involved if the government were required to undertake a transaction-by-transaction historical accounting of the Individual Indian Money accounts without regard to when the funds were deposited. The Department indicated that such an accounting would cost at least $2.4 billion over 10 years. Both prior to and subsequent to submission of that report, Congress has stated in no uncertain terms that it would not appropriate billions of dollars for a historical accounting of such magnitude. Partly in response to Congressional concerns, the Department submitted to the Court a $335 million accounting plan that included both a transaction-by-transaction accounting as well as the use of sound, well-proven statistical methods. The Department argues that such an accounting is consistent with its duties under law.

In its September 25, 2003, ruling in the Cobell v. Norton class action lawsuit, the Court dismissed Congressional concerns about the scope of the accounting and ordered a greatly expanded effort that surpasses even the accounting described in the July 2, 2002, report to Congress. Initial estimates indicate that the accounting ordered by the Court would cost between $6 billion and $12 billion over this Court-mandated time frame.

There is only one source of money available to the Subcommittee on Interior and Related Agencies, and an accounting of this magnitude would require that vast amounts of funds be diverted away from other high-priority programs, including Indian programs. That would be devastating to Indian country and to the other programs in the Interior bill. The managers note that, over the past three years, funding increases for the Bureau of Indian Affairs were primarily for trust reform related activities. The Office of Special Trustee for American Indians also tended to receive a disproportionate share of the funding increases available to the Department.

The managers continue to believe that fixing trust systems prospectively is a high priority, thereby allowing the Secretary to meet her trust and fiduciary responsibility to Indian country. But Indian country would be better served by a settlement of this litigation than the expenditure of billions of dollars on an accounting. Those billions would not provide a single dollar to the plaintiffs, and would without question displace funds available for education, health care and other services.

There will be further court proceedings in the Cobell case based on the government's likely appeal of the September 25, 2003, court ruling. The managers believe that it would be unwise to expend hundreds of millions of dollars on further accounting while this case is under appeal. Furthermore, the managers reject the no-

tion that in passing the American Indian Trust Management Reform Act of 1994 Congress had any intention of ordering an accounting on the scale of that which has now been ordered by the Court. Such an expansive and expensive undertaking would certainly have been judged to be a poor use of Federal and trust resources.

The managers therefore feel that it is time for Congress to act to delineate the exact scope of the historical accounting called for in the 1994 Act, or to develop alternative methods of resolving the current dispute. To provide time for thoughtful action on this question, language has been included in the bill affirmatively declaring that nothing in the 1994 Act or common law shall be construed to require the type of accounting described in the September 25th ruling. It is not the intent of the managers to forestall indefinitely either the Cobell litigation or any efforts to conduct an historical accounting. But in light of the expansive accounting and constrained timelines contemplated in the Court's order, it is clear that time is needed for Congress to consider the issues and tradeoffs at stake. The managers have therefore 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. Beyond that, the managers will not provide any funding until the scope of an historical accounting is resolved by the courts or by the legislative committees of jurisdiction.

During floor debate over the Interior bill, the chairman of the authorizing committee in the House made a commitment to develop a comprehensive legislative solution to what has become an intractable problem. The authorizing committee in the Senate has held numerous hearings, and has also expressed interest in addressing the problem. The managers believe that a legislative solution may be the only way to resolve these trust reform issues.

INDIAN LAND CONSOLIDATION

The conference agreement provides $21,980,000 for Indian land consolidation programs instead of $20,980,000 as proposed by the House and $22,980,000 as proposed by the Senate. The increase above the House is to support the land consolidation efforts of the Quapaw Nation.

NATURAL RESOURCE DAMAGE ASSESSMENT AND RESTORATION

NATURAL RESOURCE DAMAGE ASSESSMENT FUND

The conference agreement provides $5,633,000 for the natural resource damage assessment fund as proposed by both the House and the Senate.

ADMINISTRATIVE PROVISIONS

The conference agreement includes the Senate proposed language regarding administrative provisions for Departmental Offices. The agreement also requires a semiannual report on reimbursable support agreements between the Office of the Secretary and the National Business Center and the bureaus and offices of the Department.