IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION REQUESTING THAT THIS COURT ISSUE BENCH SUBPOENAS DIRECTED TO THIRD PARTIES BELIEVED TO HAVE TRUST DOCUMENTS RELEVANT TO AN ACCOUNTING TO PRESERVE AND PRODUCE SUCH DOCUMENTS

The Court should deny Plaintiffs' motion requesting that this Court issue its own subpoenas to thousands of nonparties with no showing that such entities actually hold documents relevant to an historical accounting of Individual Indian Money ("IIM") accounts. Plaintiffs cast their proposal as if it were a discovery request under the Federal Rules of Civil Procedure, but the massive nationwide canvassing and document collection from nonparties envisioned by Plaintiffs' motion is, in reality, a ruse to secure substantive parts of the relief that this Court granted in its opinions and structural injunction order following the Phase 1.5 trial, issued September 25, 2003. Those opinions and order are now on appeal, and the Court of Appeals has entered a stay pending resolution of the appeal. Accordingly, this Court lacks the jurisdiction and authority to bestow the substantive relief Plaintiffs seek.

Plaintiffs' proposed approach is also irreconcilable with the Court's jurisdiction under the Administrative Procedure Act, which authorizes a court to review final agency action, or determine that such action has been unlawfully delayed, but does not permit a court to undertake

the agency action itself. That Plaintiffs contemplate such an intrusion into matters committed to other branches of the government is plain: Plaintiffs expressly concede that the "Court [would] itself be considered acting on behalf of the United States in issuing such subpoena[s]."[1] Furthermore, Plaintiffs seek to charge the United States for the full cost of this undertaking, but they fail to demonstrate, as they must, that the United States has waived its sovereign immunity from such costs.

Moreover, Plaintiffs' reliance on select civil discovery decisions to support their motion is grossly misplaced. They contend that Rule 45 empowers the Court to issue its own subpoena but cite no precedent or authority for issuance of a "bench subpoena." Indeed, it appears that no federal court has invoked the authority that Plaintiffs claim exists to command the type of broad document collection Plaintiffs advocate.[2]

Finally, practical considerations make Plaintiffs' approach utterly ill-advised. Rather than flood the Court with relevant documents, Plaintiffs' motion would flood this court and others with satellite litigation over matters of jurisdiction, burden, privilege, and confidentiality. Plaintiffs also fail to show that any documents collected by this method would remedy any harm or threat of harm to any named Plaintiff or would in any other sense be useful to the historical accounting. Nor have Plaintiffs shown that relevant records could not be found by other less intrusive and less expensive means. The better approach, and one consistent with the limits of

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[1] Plaintiffs' Motion Requesting That This Court Issue Bench Subpoenas Directed to Third Parties Believed to Have Trust Documents Relevant To an Accounting to Preserve and Produce Such Documents at 7 n.13 (Mar. 2, 2004) [hereinafter, "Plaintiffs' Motion"].

[2] A search of the Westlaw database of all federal court decisions since 1944 for "bench subpoena" revealed not one instance of a court articulating and enforcing its own bench subpoena to collect documents.

this Court's jurisdiction, is the Department of the Interior's plan to pursue potential document sources outside the government in an organized fashion that augments, rather than interferes with, the historical accounting that the Department of the Interior is undertaking.

ARGUMENT

I. THIS COURT LACKS JURISDICTION TO GRANT THE REQUESTED RELIEF

Although Plaintiffs seek to compel collection of documents from third parties, they admittedly do not seek these documents for their own discovery purposes. They claim instead that this relief is needed "to protect and safeguard irreplaceable trust data that are key to a [sic] these proceedings, including the determination and correction of record title and other matters central to future trust reform . . . ." Plaintiffs' Motion at 2. Their own description of the motion thus compels the conclusion that the relief sought here is not discovery or a procedural aid to trial preparation but is instead substantive in character.

The very issue raised in Plaintiffs' motion – third-party document collection – was addressed by the parties during the Phase 1.5 trial and by the Court in its memorandum opinions and order entered after that trial. Inasmuch as the Court of Appeals has stayed this Court's structural injunction order pending resolution of the appeal, this Court lacks authority to grant the relief requested by Plaintiffs.

The filing of a notice of appeal "confers jurisdiction on the court of appeals and divests the district court of control over those aspects of the case involved in the appeal." United States v. DeFries, 129 F.3d 1293, 1302 (D.C. Cir. 1997) (citing Griggs v. Provident Consumer Disc. Co., 459 U.S. 56, 58 (1982) (per curiam)); Larouche v. United States Dep't of Treasury, 112 F. Supp. 2d 48, 52 (D.D.C. 2000). Absent a stay, an appeal from an injunction does not deprive the

district court of jurisdiction to enforce the injunction or issue supervisory orders pursuant to the injunction. See Roberts v. Colorado State Bd. of Agric., 998 F.2d 824, 827 (10th Cir. 1993); Union Oil Co. of California v. Leavell, 220 F.3d 562, 565 (7th Cir. 2000). Here, however, the Court of Appeals has entered a stay, which means that this Court is deprived of jurisdiction to modify its structural injunction or to enter supervisory orders pursuant to that injunction.

The subject matter of Plaintiffs' motion indisputably is part of the case that is on appeal. The Department of the Interior addressed third-party document collection in the plans that the Court ordered Interior to file and that were the subject of the Phase 1.5 trial. In its Historical Accounting Plan and its Fiduciary Obligations Compliance Plan, Interior informed the Court that, as part of the historical accounting process, Interior decided not to acquire IIM records from third parties immediately. See The Historical Accounting Plan for Individual Indian Money Accounts ("Historical Accounting Plan") at III-8, 9, 13 (January 6, 2003); Fiduciary Obligations Compliance Plan at 72-77 (January 6, 2003). Instead, Interior will collect third-party records when a need to do so is identified because of a specific gap in government records. See Historical Accounting Plan at III-8, 9; Fiduciary Obligations Compliance Plan at 72-73. In the meantime, Interior decided to "alert potential third-party custodians of Interior's efforts to locate and secure possible missing trust-related information and request that they retain this information." Historical Accounting Plan at III-8. Testimony and evidence were also adduced at trial concerning Interior's plans with respect to the collection of third-party documents and the steps that had already been accomplished. See, e.g., Cobell v. Norton, 283 F. Supp. 2d 66, 155-60 (D.D.C. 2003); see also Pltfs.' Phase 1.5 Trial Ex. 277 (attaching Policy and Procedures for Collection of Missing Indian Trust-Related Records From Third Parties, 68 Fed. Reg. 23,756,

23,757 (May 5, 2003); Office of Historical Trust Accounting; Historical Accounting of Individual Indian Money Accounts: Collection of Documents Related to Oil and Gas Production on Allotted Lands, 67 Fed. Reg. 5607-08 (Feb. 6, 2002)).

The Court's memorandum opinion expressly assessed Interior's plans with regard to the collection of third-party documents, 283 F. Supp. 2d at 148-49, critiqued those plans, id. at 155-60, and rejected them, id. at 160. The Court directed Interior to submit a new plan "to determine which trust-related records are likely to be possessed by third parties, to identify the records maintained by those parties, and to issue subpoenas, where appropriate, to ensure that such records are preserved." Id. The Court gave Interior sixty days to submit such a plan.[3] Id. at 288. Plaintiffs were given thirty days thereafter to submit alternative or supplemental plans for the collection of third-party documents. Id. The propriety of this Court's opinion and structural injunction order is now before the Court of Appeals, which has stayed the order while it considers the matter.

Nonetheless, Plaintiffs' motion, for all intents and purposes, seeks to enforce the provisions of this Court's structural injunction for collection of third-party documents, and goes even further. Plaintiffs seek to require Defendants – within ten days – to collect and submit to Plaintiffs and the Court the names of all third parties who at any time had a contract related to individual Indian trust lands, as a precursor for the Court to then issue subpoenas to those third parties. Plaintiffs' Motion at 4. Inasmuch as Interior has appealed this Court's injunction, and it

[3] The Court also required Interior to "complete their departmental review of policy and procedures for their collection of missing Trust information from third parties" within ninety days. 283 F. Supp. 2d at 292.

has been stayed pending appeal, this Court has been deprived of jurisdiction to grant the relief requested by Plaintiffs and the motion must be denied.[4]

II. PLAINTIFFS' PROPOSAL IS IRRECONCILABLE WITH THIS COURT'S JURISDICTION UNDER THE ADMINISTRATIVE PROCEDURE ACT

Plaintiffs' request that the Court impose a plan for collection and retention of third-party documents is also irreconcilable with the separation of powers limitations on cases where jurisdiction is conferred under the Administrative Procedure Act ("APA"). In an APA case, a court has authority to review final agency action or may find that such action has been unlawfully delayed, but it does not have authority to undertake the agency action itself. Such a judicial takeover violates the separation of powers doctrine.

The Court of Appeals has emphasized that final agency action will occur – and thus may be reviewed by this Court – when the accountings for IIM account holders are completed. Cobell v. Norton, 240 F.3d 1081, 1110 (D.C. Cir. 2001) ("Presumably, the district court plans to wait until a proper accounting can be performed, at which point it will assess appellants' compliance with their fiduciary obligations."); see also id. at 1106 (judicially enforceable duty at issue is not "to take the discrete individual steps that would facilitate an accounting," but provision of the accounting itself). Thus, final agency action is not the plan for conducting an accounting, including the plan for collection of third-party documents that might be needed for the accounting, but rather the end product – the statement of account, which will be reviewable when

[4] Even if the case were not now on appeal, Plaintiffs' wholesale failure to demonstrate that the requested relief would remedy a specific harm suffered or risked by the named plaintiffs suggests that the Court may lack subject matter jurisdiction to grant the relief. Lewis v. Casey, 518 U.S. 343, 357 (1996) (proof of harm from "one particular inadequacy in government administration" does not give plaintiff standing "to remedy *all* inadequacies in that administration.").

any applicable administrative remedies are exhausted. The Court of Appeals did not sanction a radical departure from settled principles of judicial review, nor did it authorize this Court to take over trust fund management.

These limitations reflect settled law. Although courts have power to review agency action (or inaction) and to declare it unlawful or inadequate pursuant to the standards articulated in the APA, "that authority is not power to exercise an essentially administrative function." Federal Power Comm'n v. Idaho Power Co., 344 U.S. 17, 21 (1952). The "guiding principle . . . is that the function of the reviewing court ends when an error of law is laid bare." Id. at 20. Thus, even upon declaring agency action unlawful (or unreasonably delayed), a court may not control the processes by which an agency fulfills its congressionally-mandated functions on remand. See United States v. Saskatchewan Minerals, 385 U.S. 94, 95 (1966) (per curiam) (invalidating district court order that precluded ICC from reopening evidence on remand). These limitations reflect the respective allocation of powers to the Executive and Judiciary.

Following these principles, the Court of Appeals vacated the appointment of Joseph Kieffer as Special Master-Monitor, stating that judicial intrusion into the internal affairs of an Executive Branch agency "simply is not permissible under our adversarial system of justice and our constitutional system of separated powers." Cobell v. Norton, 334 F.3d 1128, 1143 (D.C. Cir. 2003). A court cannot insert itself into the agency's decision-making process by imposing additional procedural – much less, substantive – requirements on agencies beyond those mandated by statute. As the Supreme Court stressed in Vermont Yankee Nuclear Power Corp. v. NRDC, Inc., 435 U.S. 519 (1978), the judiciary may not dictate to agencies the methods and procedures of needed inquiries on remand because "[s]uch a procedure clearly runs the risk of

'propel[ling] the court into the domain which Congress has set aside exclusively for the administrative agency.'" Id. at 545 (quoting SEC v. Chenery Corp., 332 U.S. 194, 196 (1947)). These principles apply even where an agency has delayed taking appropriate action. See In re Barr Laboratories, Inc., 930 F.2d 72, 74 (D.C. Cir. 1991).

Plaintiffs' motion goes radically further than asking the Court to direct an Executive Branch agency to perform specific tasks. Here, Plaintiffs ask the Court to usurp the Department of the Interior's role by acting on its behalf. This much is undisputed, for Plaintiffs expressly state that the "Court [would] itself be considered acting on behalf of the United States in issuing such subpoena[s]." Plaintiffs' Motion at 7 n.13. Plaintiffs' admission demonstrates that granting the motion would be irreconcilable with the Court's jurisdiction under the APA.

III. RULE 45 DOES NOT AUTHORIZE SWEEPING USE OF A BENCH SUBPOENA

Plaintiffs devote much of their motion to asserting that Rule 45 subpoenas duces tecum should be issued by this Court to all nonparties, regardless of location, in order to compel production of all responsive documents in the District of Columbia, no matter where those documents are physically located. Plaintiffs urge this result without regard to whether the nonparties have any presence in the District of Columbia and ignore fundamental due process considerations, such as personal jurisdiction, service of process, and whether production of documents located far from the District of Columbia should be compelled in the District. Plaintiffs cannot, however, expand the subpoena power of this Court beyond the terms of Rule 45 and the recognized jurisdiction of this Court.

Plaintiffs' motion seeks to convert a discovery tool for trial preparation into a wedge for extracting a substantive remedy absent a judgment. Rule 45 of the Federal Rules of Civil

Procedure is a discovery tool subject to the relevancy limitations set forth in Rule 26 of those same rules. It is not a license for the Court to amass a "document database" for some accounting purpose, which is precisely Plaintiffs' professed aim.[5] Thus, Plaintiffs' invocation of Rule 45 for a non-discovery purpose in order to secure a substantive remedy is a misuse of Rule 45 that the Court should not entertain.

A subpoena for production or inspection of documents must issue from the court for the district in which the production or inspection is to be made. Fed. R. Civ. P. 45(a)(2). Rule 45(b)(2), in turn, authorizes service of such a subpoena (1) "at any place within the district of the court by which it is issued," (2) at any place outside the district "that is within 100 miles of the place of the . . . production, or inspection specified in the subpoena," or (3) "at any place within the state" if state law authorizes statewide service of a subpoena "issued by a state court of general jurisdiction sitting in the place of the . . . production, or inspection specified in the subpoena." Fed. R. Civ. P. 45(b)(2). This Court's subpoena power for document production is, therefore, effectively circumscribed to service at places within the district or within 100 miles of the district, unless a statute authorizes otherwise. Id.

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[5] Plaintiffs characterize their proposal not as one of discovery but instead as one undertaken to:

> establish a subpoena procedure, supplemented by a special-master-supervised database or repository (the "Database") created to house and preserve critical third party documents, in order to protect and safeguard irreplaceable trust data that are key to a [sic] these proceedings, including the determination and correction of record title and other matters central to future trust reform, as well as aiding in the ultimate distribution to class members and a restatement of their accounts.

Plaintiffs' Motion at 2 (footnote omitted).

Contrary to Plaintiffs' insinuations,[6] even a subpoena that seeks only the production of documents must conform to these territorial limits on process. For example, Rule 45(e) expressly provides that it is "adequate cause" to disobey a subpoena if the subpoena "purports to require a non-party to attend or produce at a place not within the limits provided by clause (ii) of subparagraph (c)(3)(A)." Fed. R. Civ. P. 45(e) (emphasis added). The clause referenced by Rule 45(e) sets a 100-mile limit, see Fed. R. Civ. P. 45(c)(3)(A)(ii), and Rule 45(e) applies that limit to document productions as well as deposition appearances.

Courts have readily quashed subpoenas that seek document production outside the territorial limits of Rule 45. See, e.g., James v. Booz-Allen & Hamilton, Inc., 206 F.R.D. 15 (D.D.C. 2002) (subpoena issued in this District to obtain nonparty documents for inspection nearby in New Carrollton, Maryland quashed); Echostar Communications Corp. v. News Corp., 180 F.R.D. 391, 396 (D. Colo. 1998) (subpoenas issued from the District of Colorado invalid when used to compel nonparties in Georgia and New Jersey to produce documents there). A subpoena likewise has been found invalid when service was attempted on a nonparty beyond the territorial limits of the issuing district court, even though the requested document production specified a location within the district. E.g., Anderson v. Government of the Virgin Islands, 180 F.R.D. 284, 290 (D.V.I. 1998) (quashing subpoena issued in the District of the Virgin Islands and served on agency in Washington, D.C. that sought document production in St. Croix).

These recognized limitations defeat Plaintiffs' subpoena scheme. Plaintiffs seek to require nonparties to produce all responsive documents within the District of Columbia, no

[6] Although Plaintiffs insist that their motion involves "document only" subpoenas, their request that responding nonparties be ordered to provide explanatory affidavits contradicts this basic assertion. See Plaintiffs' Motion at 5.

matter how far away the nonparties reside, are employed or regularly transact business. Plaintiffs' Motion at 19. Citing one unreported magistrate decision, Stewart v. Mitchell Transport, No. 01-2546-JWL, 2002 WL 1558210 (D. Kan. July 8, 2002), they contend that these limits do not apply so long as the subpoena is for "records only." Plaintiffs' Motion at 19 n.35. Their lone decision affords scant explanation for its deviation from the plain meaning of Rule 45 and is inconsistent with the decisions of other courts. Plaintiffs' reliance on this case is also disingenuous, for their motion does not seek a "records only" production but also affirmative testimony in the form of affidavits. Therefore, Plaintiffs' sole supporting case, however weak, is not even apposite.

Plaintiffs' motion also necessarily presumes that all, or nearly all, nonparties can be served with process in or near this District. That assumption, though, flies in the face of reality. With most allotted lands located west of the Mississippi, it is unlikely that many businesses or individuals that contracted for use of such lands will be amenable to service in this District. Mere geography of the allotted lands, therefore, disfavors Plaintiffs' approach.

Plaintiffs attempt to fudge this analysis by citing a case in which a nationwide service statute expressly authorized remote, extra-district service of subpoenas. See Plaintiffs' Motion at 15 n.31. Plaintiffs omit to mention, however, that no such special statute is applicable here.[7] Similarly flawed is Plaintiffs' "minimum contacts" analysis. Plaintiffs incorrectly assume that sufficient contacts exist to satisfy due process when a nonparty contracts for the use of land owned by individual Indian allottees. These nonparties did not seek to contract for use of federal lands or to transact business in the District of Columbia; rather, they sought to lease or otherwise

[7] See, e.g., Fed. R. Civ. P. 45 advisory committee's note (1937).

use Indian lands owned by allottees outside this district for endeavors such as grazing or forestry. Such activities do not support the exercise of personal jurisdiction in the District of Columbia. See Burger King Corp. v. Rudzewicz, 471 U.S. 462, 478 (1985) ("If the question is whether an individual's contract with an out-of-state party *alone* can automatically establish sufficient minimum contacts in the other party's home forum, we believe the answer clearly is that it cannot."). Thus, it is doubtful that the Court would be able to compel production of documents from most of the nonparties who would be targeted under Plaintiffs' scheme.[8]

IV. PLAINTIFFS FAIL TO SHOW THAT THE UNITED STATES HAS EXPRESSLY WAIVED SOVEREIGN IMMUNITY FOR COSTS THEY SEEK TO IMPOSE

In presenting their motion, Plaintiffs are careful to disavow responsibility for the costs associated with the document productions they hope to precipitate. Instead, they suggest that the producing nonparties bear their own costs or that the United States be made to pay. Plaintiffs' facile financing scheme, however, takes no account of the United States' immunity from such costs under the sovereign immunity doctrine.

It is well settled that the United States cannot be sued without its consent. FDIC v. Meyer, 510 U.S. 471, 475 (1994); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 411-12 (1821). The absence of consent bars proceedings against the government. Meyer, 510 U.S. at 475. The authority to give consent does not rest with the Executive, see, e.g., United States v. Shaw, 309 U.S. 495, 500-01 (1940) (specific statutory consent is required), nor with the Judiciary, see, e.g., Lane v. Pena, 518 U.S. 187, 192 (1996). Only Congress can waive sovereign immunity.

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[8] Moreover, a subpoena must be properly served before the issue of personal jurisdiction can even arise. See FTC v. Compagnie De Saint-Gobain-Pont-a-Mousson, 636 F.2d 1300, 1313 (D.C. Cir. 1980) ("under the Federal Rules, compulsory process may be served upon an unwilling witness only in person").

That waiver must be "unequivocally expressed in statutory text." Lane, 518 U.S. at 192. Any waiver of immunity that is made must be strictly construed in favor of the sovereign. Id. It necessarily follows that a waiver of immunity as to one type of relief does not thereby also waive immunity with respect to other forms of relief. See, e.g., Library of Congress v. Shaw, 478 U.S. 310, 317-19 (1986) (waiver of immunity from attorney fees did not also waive immunity from interest on such fees). Instead, the government's sovereign immunity must be clearly and specifically waived with respect to each form of relief claimed. See id. at 314, 321.

Here, Plaintiffs seek to shift costs to the United States, but they make no showing at all, as they must, that the United States has expressly waived sovereign immunity from the cost of underwriting the unique relief Plaintiffs seek. E.g., United States v. CBS, Inc., 103 F.R.D. 365, 376 (C.D. Cal. 1984) (neither Fed. R. Civ. P. 45(b) nor 26(c) provides "legal authority for waiving such immunity and assessing any portion of the discovery costs against the government."). Indeed, Plaintiffs do not even address sovereign immunity. Absent proof of an express waiver, the United States cannot lawfully be charged with any costs.

V. EQUITABLE ACTIONS TO OBTAIN DISCOVERY FROM NONPARTIES ARE NOT GERMANE HERE

Plaintiffs' long-winded exposition on the history of "independent equitable actions" to obtain discovery from nonparties, Plaintiffs' Motion at 20-28, may be of some interest to historians, but it is irrelevant here. Plaintiffs cite no authority – and Defendants are aware of none – for the proposition that such actions to obtain discovery from third parties are still permissible in federal courts since Rules 34 and 45 were amended in 1991.[9] Indeed, at least one

[9] Apparently, Plaintiffs might be able to file such an action in Montana's state courts. See Plaintiffs' Motion at 27 n.53 (citing Temple v. Chevron U.S.A, Inc., 840 P.2d 561, 566

federal court dismissed such an independent action because of these amendments. See Franklin v. Turner, No. 92-891, 1992 WL 252121 (D. Ore. Sept. 25, 1992).

In any event, Plaintiffs have not attempted to file an independent equitable action to obtain discovery from third parties. If they wish to obtain discovery from a third party in this litigation, they are bound by the constraints of Rule 45, as discussed above.

VI. IF ADOPTED, PLAINTIFFS' APPROACH WOULD LIKELY EMBROIL THE COURT AND THE PARTIES IN A QUAGMIRE OF ANCILLARY LITIGATION

Plaintiffs apparently have invested little thought in the mechanics of their proposal.[10]

(Mont. 1992)). Even there, however, Plaintiffs would not satisfy the prerequisites set forth by Temple:

> We hold, therefore, that an equitable bill of discovery is cognizable under Montana law, but that it is available only against a person or entity which cannot be a defendant in subsequent litigation. Further, the equitable bill is available for the names and addresses of potential defendants and for on-site visits to inspect specific items which may have caused a documented injury. Finally, a plaintiff in an equitable bill action must show that the discovery requested cannot be obtained otherwise and has been requested of, and denied by, the person or entity which, for whatever reason, cannot be a defendant in subsequent litigation.

Id.

[10] Plaintiffs do, however, disparage the initial steps that Interior has taken and attack Interior's public awareness efforts, characterizing them as "warnings to third parties to encourage them to destroy their trust documents." Plaintiffs' Motion at 1. In addition to attacking, without basis, the integrity of countless third parties, Plaintiffs ignore that this Court has encouraged the very activities Interior has undertaken and has criticized Interior for not doing more publicly about records collection. See, e.g., Cobell, 283 F. Supp. 2d at 158-59 (lamenting that one Federal Register notice did not put all third parties, "except oil and gas producers," on notice of Interior's interest in collecting records). Plaintiffs disingenuously quote from answers one expert gave about previous indirect experience he had in hazardous waste cases and ascribe his remarks to the IIM documents at issue here. To the contrary, the historian, Alan Newell, testified as follows:

> Q. So to be clear, you think that the giving of the federal records notice may actually increase the risk of destruction in some instances, is that fair?

Virtually all allotted lands are situated in western states far removed from the District of Columbia. It is likewise probable that the vast majority of nonparties targeted under Plaintiffs' proposal will be found in places far beyond the jurisdictional borders of this judicial district. Yet, Plaintiffs say little about how thousands of these nonparties will be properly served with a bench subpoena. They unrealistically assume that no one served will challenge the subpoena, question the scope of the request, or object to the timetable for production,[11] the burdens imposed, or a place of production possibly more than a thousand miles away. Plaintiffs also ignore the likelihood that nonparties will have significant concerns about confidentiality and privilege.

Plaintiffs advance their argument without providing any detail about the location, character, resources or availability of the nonparties to be targeted under their motion, but enough is known about the sheer breadth of Plaintiffs' proposed undertaking to advise against it. The proposed search for records extends back more than a century, meaning that anyone having a contract involving allotted lands at any time in the last hundred years or so could be a target. Assuming even that all such third parties could be identified and still exist, the number of

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> A. I don't know. I mean I think that that is really taking a leap. . . .
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> * * *
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> Q. It is possible, but you think it is a stretch?
> A. I think it is a stretch.

Trial 1.5 Tr., June 18, 2003, p.m., at 97:20-24, 98:16-17.

[11] The motion simply assumes that documents up to fifteen years old can be produced in ninety days and that older documents (including those perhaps a century or more old) can be found and provided if the Court allows an extra ninety days.

subpoenas would likely run well into the thousands.[12] By virtue of geography alone, it is also reasonable to expect that most of these third parties are located far away from this District. If just a fraction moves to quash the subpoenas, this Court would be consumed by hundreds of ancillary cases with no assurance that the documents involved will even be helpful to an accounting.[13] If courts in other districts are approached to address any subpoena challenges, the parties will inevitably be drawn even farther away from other important work on the case. Moreover, because nonparties are generally accorded more concern than are litigants in assessing burden challenges, it is entirely conceivable that the burdensome subpoenas Plaintiffs propose will succumb to many such challenges.

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[12] For example, one letter distributed by Interior to the oil and gas industry, which requested an inventory of records related to production on allotted lands and requested that recipients preserve and maintain such records, was issued to 4,200 addressees. Policy and Procedures for Collection of Missing Indian Trust-Related Records From Third Parties, 68 Fed. Reg. 23,756, 23,757 (May 5, 2003).

[13] Beyond the concerns and objections nonparties would undoubtedly have, Plaintiffs' motion also assumes that the materials collected will be worth the effort, time, and enormous cost involved. Subpoenas would issue without regard to whether the target's records merely duplicate information already in Interior's possession or whether the materials are in a useable form. The Court would be called upon to issue subpoenas and attempt to enforce them without knowing anything about the potential usefulness of the documents being sought.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion requesting that this Court issue bench subpoenas directed to third parties should be denied in all respects.

Dated: March 16, 2004

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on March 16, 2004 the foregoing *Defendants' Opposition to Plaintiffs' Motion Requesting That This Court Issue Bench Subpoenas Directed to Third Parties Believed to Have Trust Documents Relevant To an Accounting to Preserve and Produce Such Documents* was served by Electronic Case Filing, and on the following who is not registered for Electronic Case Filing, 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 *Plaintiffs' Motion Requesting That This Court Issue Bench Subpoenas Directed to Third Parties Believed to Have Trust Documents Relevant to an Accounting to Preserve and Produce Such Documents,* Dkt. # 2506. Upon consideration of the Motion, Opposition, any Reply thereto, and the entire record of this case, it is hereby

ORDERED that the Motion is, DENIED.

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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