IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
Plaintiffs,	)	
v.	)	Case No. 1:96CV01285
	)	(Judge Robertson)
DIRK KEMPTHORNE, Secretary of the Interior, et al.,	)	
Defendants.	)	

DEFENDANTS' RESPONSE TO COURT'S
REQUESTS AT AUGUST 28, 2008 STATUS CONFERENCE[1]

At the status conference held on August 28, 2008, the Court directed the parties to provide draft orders granting partial final judgment under Rule 54(b) of the Federal Rules of Civil Procedure. The Court further requested that the parties attempt to reach agreement on those issues as to which the Court will retain jurisdiction after it issues a Rule 54(b) partial final judgment.

After further considering and researching the Court's requests, Defendants respectfully respond, initially, that the Court cannot properly enter partial final judgment under Rule 54(b)

[1] On September 3, 2008, as this Response was being prepared, the government received notice, via the Court's ECF system, of the following entry on the Court's docket for this case: "Minute Entry for proceedings held before Judge James Robertson: Status Conference held on 8/28/2008. Plaintiffs' oral 54(b) motion for judgment; heard and granted. (Court Reporter Rebecca Stonestreet.) (cp,)" In light of the Court's characterization of the August 28 proceeding at the time as a "discussion of the questions," Transcript of August 28, 2008 Status Conference (Aug. 28, 2008 Tr.) at Tr. 5:4; see also id. at 7:3-4, and because the government did not understand Plaintiffs' statement of their position as constituting an oral motion under Rule 54(b), the government did not expect this ruling. To the extent that understanding was incorrect, the government respectfully requests that the Court treat this Response as a motion to reconsider the granting of such motion.

for the reasons set forth below. Defendants request, therefore, that the Court conduct its proceeding to determine the appropriate allocation of the monies to be paid, including the development of a distribution plan. Should the Court reject the arguments presented below, Defendants submit for the Court's consideration, as Attachment A, a proposed Partial Judgment under Rule 54(b). Finally, Defendants address the housekeeping issues posed by the Court: whether the parties may agree that the Court possesses jurisdiction to consider the administrative and collateral issues still pending before it, and to identify which issues the Court could resolve.

I. THE COURT CANNOT ENTER AN ORDER UNDER RULE 54(b) BECAUSE IT FIRST MUST RESOLVE SIGNIFICANT ISSUES AND BECAUSE ITS MEMORANDUM OPINION DOES NOT CONSTITUTE A DECISION ON A DISCRETE AND SEPARATE CLAIM FOR RELIEF

Rule 54(b) provides, in relevant part, that

> When an action presents more than one claim for relief -- whether as a claim, counterclaim, crossclaim, or third-party claim -- or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay.

Fed. R. Civ. P. 54(b). Thus, a Rule 54(b) final judgment that is not disposing of a party must constitute (1) a final adjudication of (2) a discrete and separate claim. Here, neither requirement is met.

A. The Court Must Resolve Significant Issues Before It Can Issue A Final Judgment

"Rule 54(b) permits an entry of judgment for fewer than all claims presented in a civil action. Fed. R. Civ. P. 54(b). However, it permits an entry of judgment only for claims that are in fact finally decided." Strey v. Hunt Int'l Res. Corp., 696 F. 2d 87, 88 (10th Cir. 1982) (citing Curtiss-Wright Corp. v. General Electric Co., 446 U.S. 1, 7 (1980); Sears, Roebuck & Co. v.

Mackey, 351 U.S. 427, 435 (1956)). "A final judgment is 'one that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" Riley v. Kennedy, 128 S. Ct. 1970, 1981 (2008) (quoting Catlin v. United States, 324 U.S. 229, 233 (1945)); Marshak v. Treadwell, 240 F.3d 184, 190-192 (3d Cir. 2001) (quoting Catlin). Although Rule 54(b) may be used where an order is technically not the final one of the case, the only issues that may remain must be purely ministerial or mechanical. Marshak, 240 F.3d at 190-91.

In the context of class action suits, a money judgment is not final until the district court has provided for the division of the money among class members, for the disposition of funds that are unclaimed by class members, and for the measurement of attorney fees to be assessed against the common fund. Strey, 696 F.2d at 88 (citing Boeing Co. v. Van Gemert, 444 U.S. 472 (1980)); see also Parks v. Pavcovik, 753 F.2d 1397, 1402 (7th Cir. 1985) (distinguishing Strey because the remaining task of "computing the money owed each class member" was "mechanical," "unlikely to engender dispute or controversy," and would "require no analytic or judgmental determinations that might affect the questions now before us or give rise to other appealable questions"); Cook v. Rockwell Int'l Corp., No. 90-CV-00181-JLK, 2008 WL 2120524 (D. Colo. June 2, 2008) (devising a class distribution formula designed to satisfy the "finality" requirement of Rule 54(b)) (appeal pending). Because the Court has not yet made those determinations, it would be error to issue a final judgment pursuant to Rule 54(b) at this time.[2] Strey, 696 F.2d at 88.

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[2] The question whether a claim has been properly certified under Rule 54(b) is jurisdictional. The court of appeals decides de novo whether the prerequisites for certification are met, i.e., whether there was a decision upon a discrete claim for relief and whether the decision was "final." Bldg. Indus. Assoc. of Superior California v. Babbitt, 161 F.3d 740, 743 (D.C. Cir. 1998). The appellate court's power to determine its own jurisdiction includes the

This settled law dictates that a distribution plan must be established in this case before the Court can issue a final judgment. Given all of the issues that need to be resolved before a distribution plan can be finalized, the task is clearly neither ministerial nor mechanical.[3] Thus, in finding that the evidence supports an award to Plaintiffs in the amount of $455.6 million, the Court did not address the division of that award among class members or the distribution of money that is not claimed by class members. Resolution of these matters cannot fairly be viewed as ministerial; indeed, the Court appeared to expressly recognize this when it indicated that "[t]he entry of final judgment must await a third proceeding here regarding the appropriate allocation to the plaintiff class of the monies to be restored." Cobell v. Kempthorne, 2008 WL 3155157 at *28 (D.D.C. Aug. 7, 2008) (Cobell XXI); see Transcript of April 28, 2008 Status Conference (Apr. 28, 2008 Tr.) at 5 (Court opines that "the complications of figuring out who would get what share of what amount of money are quite serious problems"). That conclusion was correct and should not be altered now.[4]

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power to vacate a purported "final judgment" that is not final. See, e.g., Horn v. Transcon Lines, Inc., 898 F.2d 589, 595 (7th Cir. 1990) (appellate court vacates a Rule 54(b) judgment and dismisses the appeal for lack of jurisdiction).

[3] Defendants identified for the Court seven important issues that must be resolved in a distribution plan, highlighting that the development of such a plan is neither ministerial nor mechanical: (1) attorney fees and expenses that may be charged against the award; (2) the amount of recovery that will be paid to the named plaintiffs; (3) what, if any, notice to class members will be distributed; (4) whether and by which process class members could object to the plan; (5) who will be deemed to be a class member; (6) how would the disbursement of funds be administered; and (7) how will distribution of the funds be accomplished. Aug. 28, 2008 Tr. at 13-15. After being presented with those issues, the Court questioned "whether any of those are questions that have to be decided now if the plaintiffs want to take an appeal." Id. at 15. The case law confirms that, should Rule 54(b) be used as the vehicle to bring a final judgment to the court of appeals, the answer to the Court's question must be in the affirmative.

[4] With Plaintiffs not yet even suggesting a proper allocation of the award, the potential for, or extent of, any controversy and class conflict is not readily discernable. That does not

Another unresolved and significant issue is the definition of the plaintiff class. Rule 23(c)(3) requires that "[w]hether or not favorable to the class, the judgment in a class action must: (A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members. . . . " Fed. R. Civ. P. 23(c)(3). The scope of the class is a seriously contested issue in this case. Thus, although omission of a class definition is sometimes not considered fatal to a judgment in a class action where the parties and the court are in agreement regarding the class definition, e.g., Barney v. Holzer Clinic, Ltd., 110 F.3d 1207, 1213-15 & n.12 (6th Cir. 1997); Vaughter v. Eastern Air Lines, Inc., 817 F.2d 685, 689 (11th Cir. 1987), that is not the case here. E.g., Aug. 28, 2008 Tr. 8 (class definition contested by Plaintiffs' apparent claim that the Osage who do not hold IIM accounts are nevertheless part of the plaintiff class).

B. The Court's Memorandum Opinion Does Not Constitute A Decision On A Discrete Claim For Relief

To be eligible for a Rule 54(b) certification, an order must resolve a discrete "claim for relief." Bldg. Indus. Assoc. of Superior California v. Babbitt, 161 F.3d 740, 743 (D.C. Cir. 1998) (citing Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 437 (1956)). The Rule "does not authorize the entry of final judgment on part of a single claim." Tolson v. United States, 732 F.2d 998, 999 (D.C. Cir. 1984). As the D.C. Circuit observed in Tolson, "'[t]he line between deciding one of several claims and deciding part of a single claim is sometimes very obscure.'" Id. at 1001 n.8 (quoting 10 C. Wright, A. Miller & M. Kane, Federal Practice And Procedure § 2657, at 60-61 (2d ed. 1983)). Nevertheless, the D.C. Circuit identified as one "rule of thumb"

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mean that developing the distribution plan is a ministerial task that can be ignored in the Court's final judgment.

that "[w]hen alleged 'claims [are] so closely related that they would fall afoul of the rule against splitting claims if brought separately,' they do not qualify as 'separate' claims within the meaning of Rule 54(b)." Id. at 1101 (citations omitted). Application of that principle here demonstrates that the Court's August 7, 2008 Memorandum Opinion has not resolved a discrete claim within the meaning of Rule 54(b). Thus, even if the Court were to conclude that the unresolved class distribution issues related to the money judgment did not preclude finality, Rule 54(b) would still not be the proper vehicle to move this case to the appellate level.

There is not a discrete, separate claim to be certified under Rule 54(b) because the different forms of relief Plaintiffs have sought as part of their claim for historical accountings are all so inextricably intertwined that the Court's monetary award in Cobell XXI cannot be divorced from its other rulings on the historical accounting claim. The monetary award – should it ultimately be upheld – must, therefore, be considered a remedy that fully and finally resolves Plaintiffs' claim for historical accountings.

The history of Plaintiffs' historical accounting claim demonstrates this clearly. As the Court is aware, Plaintiffs' complaint initially sought to compel accountings under both the common law and the American Indian Trust Fund Management Reform Act of 1994, Pub.L. No. 103-412, 108 Stat. 4239 (1994 Act). In Cobell v. Babbitt, 91 F. Supp. 2d 1, 28-31 (D.D.C. 1999) (Cobell V), the Court dismissed Plaintiffs' common law claims with prejudice. Thus, by 2005, the Court held that "[t]he plaintiffs' single 'live' cause of action seeks a remedy for this legal breach [failure to provide an accounting], and the remedy that this Court has fashioned is limited to ensuring that the defendants produce the requisite accounting of the Indian trust." Cobell v. Norton, 226 F.R.D. 67, 77 (D.D.C. 2005); see Cobell v. Kempthorne, 455 F.3d 301, 314-15

(D.C. Cir. 2006) (Cobell XVIII) (court of appeals confirmed that the accounting of the IIM trusts is the "ultimate relief sought in this case" and "the ultimate relief sought by the class members.").

Subsequently, in its January 30, 2008 Findings of Fact and Conclusions of Law, this Court held, as a matter of law, that it is impossible for Plaintiffs to obtain an adequate historical accounting of their IIM accounts. Cobell v. Kempthorne, 532 F. Supp. 2d 37 (D.D.C. 2008) (Cobell XX). The Court further opined that its conclusion of impossibility meant "that a remedy must be found for the Department's unrepaired, and irreparable, breach of its fiduciary duty over the last century." Id. at 103.

The Court subsequently set a date for a status conference to "discuss a process for determining an appropriate remedy." Transcript of March 5, 2008 Status Conference at 39:14-40:24. The Court did not suggest that it was setting a hearing on a new claim with its own separate remedy. Instead, the Court stated at an April 28, 2008 status conference that, while it wanted to address an award with a dollar sign in front of it, it "refuse[d] to call it either damages or restitution or disgorgement." Apr. 28, 2008 Tr. 5. The Court then set a trial date of June 9, 2008, for "the purpose of determining the dollar amount of" Plaintiffs' proposed alternative equitable remedy. May 2, 2008 Pretrial Order (Dkt. No. 3526). The Court expressly stated, "My findings of January 30, 2008, will serve as a starting point for final determination." Id.

This history of Plaintiffs' historical accounting claim demonstrates that the Court's finding of impossibility is crucial to its analysis of Plaintiffs' restitution claim. It is difficult to imagine how Plaintiffs could have brought these claims in successive lawsuits. Tolson, 732 F.2d at 1001; see Gold Seal Co. v. Weeks, 209 F.2d 802, 809-810 (D.C. Cir. 1954) ("There is a

totality of facts out of which every legal wrong grows; but a single wrong cannot be made the basis for a plurality of actions by alleging in one case but a part of that totality and in another or other cases the remainder thereof."). Indeed, the above history leaves no doubt that if the Court had found Interior's work on the historical accounting adequate, the Court and the parties would not have litigated an alternative "appropriate remedy." It was the Court's finding of impossibility that led to the trial that commenced in June 2008. Moreover, the Court invoked its finding of impossibility to shift to the government the burden of quantifying and explaining any "shortfall" between money received into the IIM system and money posted to individual IIM accounts. Cobell XXI, 2008 WL 3155157 at *11. The Court also cited its impossibility finding to employ an evidentiary presumption in favor of Plaintiffs, through which the Court made the assumption, without evidence to support it, that all of the unexplained funds in the IIM system should have been posted to individual IIM accounts. Cobell XXI, 2008 WL 3155157 at *18, 26. This Court could not have been clearer regarding the inextricable relationship between the monetary award and the earlier October 2007 trial that resulted in its impossibility finding:

> The government surely came to these proceedings with something to prove: it had produced [at the October 2007 trial] a document stating - admitting - that only 77 percent of systems receipts had been posted to IIM accounts, see DX-365, and it could not produce a precise accounting for the funds so received and posted.
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> * * *
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> From the beginning of the 2008 trial, the government had the burden of explaining the gap between receipts and postings revealed by its exhibits from the October 2007 trial.

Id. at 26.

The Court found the claim related to Interior's failure to distribute and post funds to IIM

accounts within the fourth prayer for relief in Plaintiffs' complaint. Id. *18 n.16. That fourth prayer was a request for a "decree directing the Defendants to make whole the IIM accounts of the class members," a prayer for relief that depended upon and was plainly intended to flow from the accounting and to adjust accounts in accordance with the results of the accounting effort. Indeed, the apparent purpose of the prayer for an accounting in Plaintiffs' complaint was the eventual restatement of account balances in accordance with the results of the accounting.

Having found the historical accounting impossible and acknowledging that it could not award substitutionary relief, the Court has used an alternative method to identify funds allegedly improperly allocated and paid, namely by analyzing the aggregate flow of funds through the entire IIM system and applying evidentiary presumptions. This rationale for awarding money to Plaintiffs cannot, however, operate to split Plaintiffs' single remaining claim into multiple claims. These issues "arise from a nexus of fact and law so intertwined that if [the court of appeals] decide[s] the one now, [it] may nonetheless face many of the same questions in determining the other later." Bldg. Ind. Assoc. of Superior California, 161 F.3d at 745.

Despite this, the Court's language in Cobell XXI could be interpreted to suggest for the first time that, after twelve years of litigation, two claims are now encompassed by Plaintiffs' request for historical accountings. The Court stated that "[t]he government has breached its fiduciary duty to the plaintiffs in two ways that are separate from one another," namely the "failure properly to allocate and pay trust funds to beneficiaries" and the "failure to account." Cobell XXI, 2008 WL 3155157 at *18. These "failures" do not, however, constitute separate claims for purposes of Rule 54(b). Instead, they are integrally related to, and part of, the same

claim.[5]

Finally, although it was not clear at the August 28, 2008 status conference, the Court seemed to suggest that unresolved issues, such as the terms of a distribution plan, the need for Interior to file quarterly reports, or the possible issuance of Historical Statements of Account, could be treated as separate "claims" that would remain under this Court's jurisdiction while issues related to both Cobell XX and Cobell XXI could be appealed as part of the "final judgment" that the Court proposed to issue under Rule 54(b). However, the unresolved issues about which the Court seeks to retain jurisdiction are not distinct "claims" that could be brought separately, as contemplated under Rule 54(b). These are collateral issues that arise from the single historical accounting claim that has formed the basis for this litigation and are not separate "claims." To the extent these issues (such as the need for a distribution plan) remain pending and present more than ministerial action, they further suggest that final judgment on the single claim in this case cannot yet be rendered.

For these reasons, Cobell XX and Cobell XXI do not each constitute a decision resolving a discrete claim. Once the Court approves a distribution plan and, as noted below, resolves the few other collateral issues related to the historical accounting claim, resort to Rule 54(b) should be unnecessary. Both claims for relief asserted by Plaintiffs – the historical accounting claim and the "fixing the system" claim may then be resolved, obviating the need for any partial judgment. See 10 James Wm. Moore et al., Moore's Federal Practice ¶54.25 [2] (3d ed. 1997).

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[5] In seeking a partial final judgment, Plaintiffs' counsel twice stated that the judgment should address all issues arising out of Cobell XX and Cobell XXI. Aug. 28, 2000 Tr. at 9, 20. Defendants agree that any final judgment must encompass all issues arising out of both decisions, given the inextricable relationship between the two.

As the Court is aware, Plaintiffs' original complaint contained a claim for the performance of a historical accounting, as well as a claim seeking implementation of trust reforms pursuant to the 1994 Act. This latter claim became known as the "fixing the system" claim. In Cobell v. Norton, 392 F.3d 461 (D.C. Cir. 2004), the court of appeals held that, regarding this "fixing the system" portion of the case, the only enforceable requirement that Interior had was to complete and file its "To-Be Plan," a plan outlining how the trust would operate after Interior effected reforms. That "To-Be Plan" was filed with the Court on March 15, 2005, and the filing of that Plan (Dkt. No. 2882), has resolved the "fixing the system" claim. Although Plaintiffs have challenged that position, they have twice sought to have the "fixing the system" portion of the case dismissed, so that a final judgment can be entered. Transcript of June 25, 2008 Trial at 1692:17-1693:6 (requesting dismissal without prejudice); Plaintiffs' Proposed Findings of Fact and Conclusions of Law at 192 (July 11, 2008) (Dkt. No. 3549) (seeking dismissal of the "fixing the system" claim to ensure that this case "comes to a close"). Because Interior has met the only requirement found to exist by the court of appeals, the "fixing the system" claim should be dismissed with prejudice. At any rate, a dismissal of that claim in conjunction with the Court's judgment on the accounting claim, as requested even by Plaintiffs, would leave no claim subject to partial judgment under Rule 54(b). Therefore, the Court could properly enter a final judgment and thereby avoid the cost, delay and judicial inefficiency which could result from sequential, piecemeal appeals.

C. Alternatively, Defendants Provide The Court With A Proposed Order Pursuant to Rule 54(b) That Addresses The Correct Scope Of A Partial Final Judgment In This Case

At the outset of the August 28, 2008 status conference, the Court articulated potential claims it believes Cobell XXI does not address. Aug. 28, 2008 Tr. 3-4. What remains unclear are the issues Cobell XXI does resolve. If the Court rejects our arguments that Rule 54(b) is inappropriate and potentially inefficient, we have attached a proposed Rule 54(b) partial final judgment that clarifies what Cobell XXI resolves, and clearly addresses Cobell XX as well. The proposed partial final judgment disposes of all Plaintiffs' claims brought under the 1994 Act and any other statute or any principle of common law, related to Interior's obligation to perform historical accountings and to distribute Historical Statements of Account as part of that accounting. Because the judgment cannot be final unless it resolves the accounting claim, the proposed judgment states that the accounting claim is resolved and that the government has no further obligation to perform a historical accounting. It also clarifies that all assertions by Plaintiffs that more money should be reflected in their IIM accounts are resolved; and all account balances should now be deemed accurate and reflecting the appropriate accounting of all funds deposited into and disbursed from the individual IIM accounts, based upon the Court's $455.6 million award. This is because, using an aggregate analysis and presumptions that favor Plaintiffs, the Court has finally determined that the historical accounting would have shown an aggregate discrepancy of $455.6 million had it been completed. Because the judgment must define the class covered by the order, the proposed judgment also defines that class using the parameters set forth in Cobell XX.

Finally, Plaintiffs have suggested a "belt and suspenders approach," urging the Court to issue both a Rule 54(b) certification and certification under 28 U.S.C. § 1292(b). Aug. 28, 2008 Tr. at 20. As the court knows, certification by a district court under section 1292(b) triggers a very short time frame within which to seek certification from the court of appeals. See 28 U.S.C. §1292(b); FRAP 5(b)(2) (cross-petition). The government needs sufficient time to consider whether to request section 1292(b) certification and to formulate precise questions for a section 1292(b) certification order (having not yet been asked to do so by the court). Should the Court wish to proceed under section 1292(b), we respectfully request twenty business days to permit the Acting Solicitor General sufficient time to review the pertinent rulings and to determine whether an appeal is appropriate and what the nature of such an appeal should be.

II. Several Ministerial Issues Exist That The Court May Address After Final Judgment Has Been Rendered

Several unresolved issues remain, some of which constitute purely ministerial matters that will not affect or be affected by an appeal, while others should be resolved by the Court as part of any final judgment. Although, as briefly noted below, the parties obviously cannot confer jurisdiction upon this Court through agreement, Defendants set forth and address those unresolved issues.

A. The Parties Cannot Confer Jurisdiction Upon The Court Through Agreement

It is axiomatic that the parties cannot confer jurisdiction upon the Court through agreement. Wisconsin v. Ho-Chunk Nation, 463 F.3d 655, 661 (7th Cir. 2006) ("It is, however, axiomatic that '[n]o court may decide a case without subject matter jurisdiction, and neither the parties nor their lawyers may stipulate to jurisdiction or waive arguments that the court lacks

jurisdiction.'" (quoting United States v. Tittjung, 235 F.3d 330, 335 (7th Cir. 2000)); Barnes v. Kline, 759 F.2d 21, 29 n.16 (D.C. Cir. 1985) ("parties may not create jurisdiction by mere stipulation"), vacated on other grounds, Burke v. Barnes, 479 U.S. 361 (1987); see Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 818 (1988) (noting "age-old rule that a court may not in any case, even in the interest of justice, extend its jurisdiction where none exists"). Therefore, whether the parties agree on what issues may be addressed by the Court after issuance of a final judgment cannot resolve the jurisdictional matter.

B. "Administrative Issues" Remain Which The Court Can Address

As noted above, the Court may consider, if it decides to enter a partial final judgment, issues which are not involved in the appeal of that partial judgment and which would not affect the questions on appeal. See Mahone v. Ray, 326 F.3d 1176, 1179 (11th Cir. 2003). Defendants believe several such issues exist and have attempted to identify all of them. These include, but may not necessarily be limited to:

1. Whether Interior and the Department of the Treasury should be relieved of their obligation to file quarterly and monthly reports.
2. Whether Interior should be relieved of its obligation to deliver all of its e-mails to, and store those e-mails at, ZANTAZ.
3. The return to Defendants of all IT security documents in Plaintiffs' possession as a result of discovery conducted by Plaintiffs related to the 2005 IT Security trial.
4. Whether Treasury has purged itself of the contempt found earlier by this Court in Cobell v. Babbitt, 37 F. Supp. 2d 6 (D.D.C. 1999) (Cobell II). A

motion addressing this matter is pending before the Court. (Dkt. No. 756, filed July 9, 2001).

5. Whether the document retention orders in this case should now be terminated. See August 12, 1999 Order Regarding Interior Department IIM Records Retention (Dkt. No. 370); August 12, 1999 Order Regarding Treasury Department IIM Records Retention (Dkt. No. 369).

6. Whether, as previously briefed to this Court, the Class Communication Orders (including those Orders related to land sales) should be terminated or modified.

C. Issues Remain That Should Be Resolved Before Final Judgment Is Entered

Other issues, because they are inextricably intertwined with matters addressed by the proposed partial final judgment and are related to the possible appeal, should be resolved before a partial final judgment, if any, is entered. These include:

1. Whether Interior should continue to generate Historical Statements of Account, and whether the Court should issue the pending HSAs now before it.

2. Whether Interior is required to expend taxpayer monies to perform historical accountings which have been found impossible to perform.

Dated: September 3, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on September 3, 2008 the foregoing *Defendants' Response to Court's Requests at August 28, 2008 Status Conference* was served by Electronic Case Filing, and on the following who is not registered for Electronic Case Filing, by facsimile:

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/s/ Kevin P. Kingston
Kevin P. Kingston

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al. Plaintiffs, v. DIRK KEMPTHORNE, Secretary of the Interior, et al. Defendants.	)	Case No. 1:96CV01285 (Judge Robertson)

PARTIAL JUDGMENT

For the reasons set forth in this Court's Findings of Fact and Conclusions of Law entered January 30, 2008 (Dkt. No. 3505) (reported at Cobell v. Kempthorne, 532 F. Supp. 2d 37 (D.D.C. 2008) (Cobell XX)), and this Court's Memorandum entered August 7, 2008 (Dkt. No. 3573) (reported at Cobell v. Kempthorne, 2008 WL 3155157 (D.D.C. Aug. 7, 2008) (Cobell XXI)), the Court hereby enters Partial Judgment in favor of Plaintiffs herein, including all members of the certified class as determined below, and against Defendants Dirk Kempthorne, Secretary of the Interior, et al., pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, as follows:

1. Pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, and the Administrative Procedure Act, 5 U.S.C. §§ 701-706, the Court declares that the historical accounting required by the American Indian Trust Fund Management Reform Act of 1994, 25 U.S.C. § 4001 et seq. (the "1994 Act"), as confirmed by Cobell v. Norton, 240 F.3d 1081 (D.C. Cir. 2001) ("Cobell VI"), is impossible as a matter of law, for the reasons set forth in Cobell XX.

2. Pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, and as explained in Cobell XXI, this Court declares that Plaintiffs have demonstrated that the certified class, as defined below, is entitled, as an alternate remedy, to equitable relief in the nature of restitution to all class members of the dollar amounts, in aggregate for all class members, deposited for the benefit of all Individual Indian Money ("IIM") trust accounts during the period from January 1, 1887, through and including September 30, 2007, but not shown to have been distributed to class members. The Court further declares as follows:

(a) The aggregate amount to be restored to the certified class is FOUR HUNDRED FIFTY-FIVE MILLION AND SIX HUNDRED THOUSAND DOLLARS ($455,600,000.00), to be distributed among class members pursuant to a distribution plan to be determined by future Order of this Court, after consideration and determination of any proposed deductions therefrom, including but not limited to attorney fees, nontaxable litigation costs and administrative expenses.

(b) Defendants are forever discharged from any duty or obligation to perform the historical accounting described in paragraph 1 above, including the preparation or provision of historical statements of account, and Defendants are deemed to have accounted for the daily and annual balances of all funds held in trust by the United States with respect to all accounts owned at any time by members of the class as shown in the records of the Department of the Interior through September 30, 2007, provided that nothing contained in this Partial Judgment shall alter or limit Defendants' ongoing duty to provide periodic statements of account or other

account information to IIM account holders, as required by the 1994 Act, for transactions on or after October 1, 2007.

(c) Defendants are discharged from and shall incur no further liability for any claims arising from any obligation under the 1994 Act, any other statute, or any principle of common law to perform a historical accounting for any period prior to October 1, 2007, for any class member and for any claims of unlawful withholding of funds collected on behalf of any class member at any time through September 30, 2007; and the ending balance of each class member's account as of September 30, 2007, is deemed the true and correct statement of any monies still owed from the monies collected on the class member's behalf and any interest accrued thereon up to and including September 30, 2007.

3. Pursuant to Rule 23(c)(3)(A) of the Federal Rules of Civil Procedure, the Court hereby determines the certified class subject to this Partial Judgment to be all persons who, as of September 30, 2007, have, or at any previous time had, an IIM account, exclusive of any persons who, prior to the filing of the Complaint in this matter, had filed actions on their own behalf alleging claims included in the Complaint.

4. In accordance with this Court's determination on January 30, 2008, Cobell XX, 532 F. Supp. 2d at 98, that class members who died prior to October 25, 1994, the date of enactment of the 1994 Act, have no standing to assert any claim under said statute, such deceased class members are precluded from any relief provided to the class pursuant to this Partial Judgment. See Order Certifying Class Action (Feb. 4, 1997) (Dkt. No. 27), as modified by Cobell XX, 532 F. Supp. 2d at 98.

5. The Court determines that there is no just reason for delay in the entry of this Partial Judgment and directs that it be entered.

6. Notwithstanding the foregoing, the Court shall retain jurisdiction to consider and adjudicate any matters that are ministerial in nature or do not conflict with the jurisdiction of any appellate court reviewing this Partial Judgment.

SO ORDERED:

_____

James Robertson, District Judge