

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al., )  
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 Plaintiffs, )  
 )  
 v. )  
 )  
 DIRK KEMPTHORNE, Secretary of the Interior, )  
 et al., )  
 )  
 Defendants. )  
 \_\_\_\_\_ )

Case No. 1:96CV01285  
(Judge Robertson)

**INTERIOR DEFENDANTS’ REPLY IN SUPPORT OF MOTION FOR LEAVE TO FILE  
INTERIOR’S STATUS REPORT TO THE COURT NUMBER 31  
ON OR BEFORE FEBRUARY 1, 2008**

Plaintiffs’ Opposition to Defendants’ Motion for Leave to File Interior’s Status Report to the Court Number 31 on or before February 1, 2008 (“Opposition”), fails to show why this Court should not give Interior an additional three months to file its next status report due to the trial commencing on October 10, 2007.

First, Plaintiffs fail to explain why Interior should provide a report on November 1st on the status of the historical accounting – the only live issue before the Court in this litigation<sup>1</sup> – when that is a primary purpose of the trial that is starting on October 10th. Status Hrng. Tr. 76:23-24 (June 18, 2007) (“First, it’s going to be about what you’re doing and what you’re not doing [to perform the historical accounting plan submitted May 31, 2007].”).

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<sup>1</sup> It is now established that “[P]laintiffs’ single ‘live’ cause of action seeks a remedy for this [failure to provide an accounting],” and that the remedy available 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 also Cobell v. Kempthorne, 455 F.3d 301, 314 (D.C. Cir. 2006) (“Cobell XVIII”) (stating that the “ultimate relief sought in this case is an accounting of the IIM trust”), cert. denied, 127 S. Ct. 1875 (2007).

Instead, Plaintiffs argue – but make no showing – that trust reform continues to be a part of this case. Opposition at 3. They cite no authority contradicting Interior’s position that, in 2005, Interior fulfilled its trust reform obligations in this litigation in compliance with Cobell XIII. Defs.’ Motion at 3 (citing Cobell v. Norton, 392 F.3d 461, 478 (D.C. Cir. 2004) (Cobell XIII) and Defendants' Notice of Filing The Department of the Interior's Fiduciary Trust Model and "To-Be" Model (March 15, 2005) (Dkt. No. 2882)). Specifically, Plaintiffs assert, “[t]here is nothing credible that even suggests defendants have done anything meaningful in reforming their inadequate trust management systems” or “even begun to provide to the plaintiff class anything resembling a remedy for historic and continuing breaches of trust.” Opposition at 3. Yet Plaintiffs ignore not only the conclusion of the Court of Appeals and thirty status reports filed to date with this Court, but the Government Accountability Office (“GAO”) report of December 2006 that confirms the progress of IIM trust reform.<sup>2</sup>

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<sup>2</sup> Government Accountability Office, Report No. GAO-07-104, *The Office of the Special Trustee Has Implemented Several Key Trust Reforms Required by the 1994 Act, but Important Decisions about Its Future Remain 4-5* (Dec. 2006), cited in Status Report to the Court No. 28 at 9 (Feb. 1, 2007). The GAO reported:

[The Office of the Special Trustee (“OST”)] estimates that almost all of the key trust reforms needed to develop an integrated trust management system and to provide improved trust services will be completed by November 2007, but OST believes some additional improvements are important to make. Specifically, in May 2000, OST implemented a new trust funds accounting system for processing trust account funds. In addition, BIA has developed a centralized trust asset and accounting management system for managing land title records and leasing activities for Indian lands. OST and BIA are currently verifying the accuracy of the leasing information by comparing data in BIA’s trust asset and accounting management system with BIA’s local land records for each tract of Indian land that has recurring income from leasing the rights to natural resources.

Id. at 4-5.

Plaintiffs observe that Interior Defendants did file status reports during or leading up to previous trials, and that Defendants have failed to specify the individuals and their involvement in preparing the next status report. Opposition at 1. They then conclude that Interior should have no trouble preparing the report during this trial because it has “tens of thousands of Interior employees and [] thousands of contractors who are paid to perform Interior functions.” Opposition at 2. Even if Interior had a million employees or contractors, it would not change the fact that the efforts of specific individuals – including staff from the Office of Historical Trust Accounting and other components of the Office of the Special Trustee, as well as attorneys from the Interior’s Solicitor’s Office and the Department of Justice – are needed for the trial, and that these same individuals are integral to the process of preparing the status report.

Plaintiffs also assert that regardless of the burden of producing the report, Interior should not be permitted to delay “because the quarterly reports are a sanction imposed by this Court.” Opposition at 2. Again, Plaintiffs cite nothing to support this position. This Court imposed the reporting requirement after the Phase I merits trial, not as a sanction, but “to ensure that defendants diligently take steps to bring themselves into compliance with their statutory trust duties.” Cobell v. Babbitt, 91 F. Supp. 2d 1, 56 (D.D.C. 1999) (Cobell V), aff’d, 240 F.3d 1081 (D.C. Cir. 2001) (Cobell VI).

Finally, Plaintiffs argue that although the status reports are “materially flawed and incomplete . . . , they now provide the only source of information for beneficiaries regarding the trustee-delegates’ conduct in the management and administration IIM Trust assets.” Opposition at 4. First, Plaintiffs fail to show why a three-month delay in receiving an allegedly “flawed and incomplete” report on subjects no longer part of this litigation would prejudice them. Moreover,

the status reports are far from the “only source of information” available to beneficiaries. Substantial information is available, for example, on the OST and Bureau of Indian Affairs websites ([www.doi.gov/ost/information/index.html](http://www.doi.gov/ost/information/index.html) and [www.doi.gov/bureau-indian-affairs.html](http://www.doi.gov/bureau-indian-affairs.html)), which include links to the above-cited GAO report, to congressional testimony by Secretary Kempthorne and Associate Deputy Secretary James Cason, and to the 2007 historical accounting plan documents. Beneficiaries may also call OST’s toll-free Trust Beneficiary Call Center (1-888-678-6836). In sum, Plaintiffs will suffer no prejudice if Status Report 31 is filed on February 1, 2008.

Accordingly, Interior Defendants’ motion should be granted.

Dated: October 3, 2007

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on October 3, 2007 the foregoing *Interior Defendants' Reply in Support of Motion for Leave to File Interior's Status Report to the Court Number 31 on or Before February 1, 2008* was served by Electronic Case Filing, and on the following who is not registered for Electronic Case Filing, by facsimile:

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