No. 03-5314

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

ELOUISE PEPION COBELL, et al.,

Plaintiffs-Appellees,

v.

GALE A. NORTON, SECRETARY OF THE INTERIOR, et al.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

# APPELLANTS' MOTION FOR STAY PENDING APPEAL

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| v. | ) | No. 03-5314 |
| GALE A. NORTON, Secretary of the Interior, et al., | ) | [Civil Action No. 96-1285 (D.D.C.)] |
| Defendants-Appellants. | ) | |

## MOTION FOR STAY PENDING APPEAL

Defendants-appellants the Secretary of the Interior, et al., respectfully ask this Court to stay the "Structural Injunction" entered by the district court on September 25, 2003, pending the disposition of this appeal. In issuing its injunction, the district court declared that it "will neither grant any stay of the structural injunction * * * nor entertain any motion seeking such a stay." Historical Accounting Opinion ("Op.") at 228. However, we are simultaneously filing a motion for a stay in district court in compliance with F.R.A.P. 8 and in light of legislation signed into law on November 10, 2003, discussed below. Because the injunction sets out a series of deadlines commencing on November 24, 2003, we are filing this motion now to facilitate the Court's consideration and will promptly inform the Court if the district court acts on our motion.[1]

## INTRODUCTION AND SUMMARY

The Department of Interior ("Interior" or "DOI") currently holds approximately $415 million in trust for the benefit of individual Indians. These funds are maintained in about 260,000 separate accounts – the Individual Indian Money ("IIM") accounts that are the subject of this litigation. This Court has twice issued decisions in this litigation. In Cobell v. Norton, 240 F.3d 1081 (D.C. Cir. 2001), the Court concluded that the American Indian Trust Fund Management Reform Act, Pub. L.

[1]Pursuant to Local Rule 8, plaintiffs' counsel has been given advance notice, by telephone, of the filing of this motion.

No. 103-412, 108 Stat. 4239 (1994) (the "1994 Act"), codified an enforceable duty to perform an accounting for the IIM accounts and affirmed a district court ruling remanding to the agency to perform the accounting. 240 F.3d at 1102, 1110. In Cobell v. Norton, 334 F.3d 1128 (D.C. Cir. 2003), the Court reversed a judgment of contempt that had been based in part on the district court's conclusion that the Secretary of the Interior had failed to initiate a historical accounting. Id. at 1150.

The current Administration has made the performance of an accounting a priority. In January 2003, Interior issued a plan to complete an accounting fully consistent with this Court's decision within five years at a cost of $335 million.

On September 25, 2003, the district court issued an 18-page "Structural Injunction" (along with two opinions totaling 351 pages) that rejects Interior's plan and asserts judicial control over virtually all aspects of trust fund management.[2] The court purported to model its ruling on structural injunctions in which federal courts have assumed control over state prisons, hospitals and other institutions. See Op. 35-60. The injunction imposes a broad variety of requirements with compliance dates beginning November 24, 2003. See Order 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 ("Cason Decl.") (Exh. A) at 5 (attached). 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 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:

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[2]The court's order and opinions are included in a separately bound appendix.

> (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 (Exh. B.) (attached).

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) (Exh. B) (attached).

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 this Court's two prior decisions in this litigation.

As discussed in the attached 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.

## STATEMENT

1. The Declaratory Judgment and the First Appeal.

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), 25 U.S.C. § 4011(a).

Plaintiffs filed this class action in 1996 to require Interior to take actions with respect to individual Indian money ("IIM") accounts. The district court dismissed plaintiffs' common law trust claims, but allowed their suit to go forward because plaintiffs' "statutorily-based claims against the government can be brought under the APA." Cobell v. Babbitt, 91 F. Supp. 2d 1, 29 (D.D.C. 1999).

The court issued a declaratory judgment holding that Interior had an enforceable duty to provide an accounting for IIM funds, including funds deposited prior to passage of the 1994 Act. Because the agency had not yet provided such an accounting, the court remanded the matter to allow DOI the opportunity to come into compliance. The court also retained jurisdiction for five years, and required DOI to file quarterly reports explaining the steps taken to rectify the breaches found. Id. at 56. The declaratory judgment also purported to declare breaches of trust obligations with respect to a variety of other matters, including staffing and computer support. Id. at 49-50, 58.

This Court largely affirmed, concluding that agency action had been improperly delayed under governing Administrative Procedure Act ("APA") standards. Cobell v. Norton, 240 F.3d 1081, 1108 (D.C. Cir. 2001). The Court explained, however, that the only actionable breach of duty was the failure to produce an accounting, and required the district court to amend its order to the extent that it purported to exercise jurisdiction over other related duties such as the management of computer systems. Id. at 1106. The Court stressed that the choice of how an accounting should be conducted was properly left to the agency, id. at 1104, and admonished the district court "to be mindful of the limits of its jurisdiction," id. at 1110, explaining that its jurisdiction was confined to determining whether future steps taken by Interior were so defective that they would "necessarily delay rather than accelerate the ultimate provision of an adequate accounting," id.

2. The Contempt Judgment and the Second Appeal.

Within months of assuming office in January 2001, Secretary Norton created the Office of Historical Trust Accounting ("OHTA"), which she charged with developing a plan for historical accounting. 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 DOI Accounting Plan at 2. As of November 1, 2002, Interior had reconciled 14,235 judgment accounts with balances totaling over $40 million and had also made substantial progress in reconciling per capita accounts. Id. at I-1, I-2; see also Cason Decl. at 3 (describing further progress as of September 30, 2003).

Despite this evidence of progress, the district court paid little regard to the terms of this Court's ruling. It did not amend its order, as this Court had mandated, and with the aid of a Court Monitor and a Special Master, launched detailed inquiries into computer systems, information security, and a variety of other subjects. See Cobell v. Norton, 334 F.3d 1128,1134-35 (D.C. Cir. 2003). In 2002, based on purported failures to initiate a historical accounting and claimed inaccuracies in the court-ordered progress reports, the court held the Secretary of the Interior and an Assistant Secretary in contempt, Cobell v. Norton, 226 F. Supp. 2d 1 (D.D.C. 2002), concluding that "Secretary Norton and Assistant Secretary McCaleb can now rightfully take their place * * * in the pantheon of unfit trustee-delegates." Id. at 161. Based on the contempt trial, the court declared that it "will not simply remand the matter back to the agency again as it did in December of 1999," id. at 152, and advised the Secretary that she should resign if she believed that she could not properly discharge her statutory functions under the terms of the court's order, id. at 133.

This Court reversed and vacated the contempt ruling, noting, inter alia, that the record demonstrated that "in her first six months in office Secretary Norton took significant steps toward completing an accounting," and that the court-appointed monitor had recognized that the Office of Historical Trust Accounting created by Secretary Norton had "'made more progress . . . in six months [July through December, 2001] than the past administration did in six years.'" 334 F.3d at 1148. The Court explained that "[t]hese uncontested facts are inconsistent with a finding that Secretary Norton failed to" initiate a historical accounting. Id. With respect to the remaining contempt charges, the Court described key aspects of the district court's reasoning as "mystifying," id. at 1149, and "inconceivable," id. at 1150.

3. Interior's Plans and the Structural Injunction.

Having determined in its contempt order that it would assume control over trust operations, and would not remand to the agency, the district court proceeded to review two plans submitted by Interior pursuant to the contempt ruling. The first was the Historical Accounting Plan for Individual Indian Money Accounts (Exh. C) (attached), addressing historical accounting. Pursuant to court order, 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 (Exh. D) (attached), 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 trial, the district court declared that it would treat the factual findings made in its contempt ruling as having been established because, in the district court's view, they had not been set aside by this Court. See Op. 23-24. The district court explained that it was issuing a structural injunction, rather than remanding to the agency, because it did not trust the Secretary or her subordinates to carry out their official duties. See id. at 250-63. The structural injunction was accompanied by a "Historical Accounting" opinion and a "Fixing the System" opinion. These rulings radically transform the Interior Accounting Plan and Comprehensive Trust Management Plan and incorporate both, as altered, into the injunction.

a. The Historical Accounting Ruling

The district court's 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 this Court's understanding of the 1994 Act's directive 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 240 F.3d at 1102.

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

[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 (continued...)

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. 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 this Court's 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. 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. 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. 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. 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. 172-76.

b. The "Fixing the System" Ruling

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[3](...continued)
(TFAS). See DOI Accounting Plan at II-4. "Account information recorded since December 31, 2000, will be considered current accounting activity." Id.

As noted, in addition to its Accounting Plan, DOI also submitted at the district court's direction a Fiduciary Obligations Compliance Plan, later supplemented by a Comprehensive Trust Management Plan.

The Comprehensive Trust Management Plan 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 district court declared that the "scope and nature" of Interior's duties to IIM beneficiaries were "coextensive" with the duties of a common law trustee. Fixing the System Opinion ("FTS Op.") 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. (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.

## REASONS WHY THE STAY SHOULD BE GRANTED

## I. THE GOVERNMENT'S APPEAL WILL SUCCEED ON THE MERITS.

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

As this Court 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. The Court set out its understanding of the duty

codified by Congress, and DOI has consistently sought to comply with this Court's opinion.

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 court-ordered accounting 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 district 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 this Court's initial decision makes 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 the district court's injunction 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 District Court Had No Authority To Issue A Structural Injunction.**

Even if Congress had not acted, the district 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 this Court recognized in its initial opinion, 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 this Court also made clear, this suit is not (and could not be) a suit to enforce performance of all trust-related matters. Thus, the Court required the district 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 Court further instructed the district 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 Court's ruling left no room for "structural injunctions," much less overarching orders to "fix the system."

If the district 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.) A district court cannot, in effect, appropriate funds and direct their expenditure.

The district 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. A 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 17. The creation of a new Monitor and agents pointedly disregards this Court's ruling that such a role "is unknown to our adversarial legal system." 334 F.3d at 1142.

Finally, the record provides no basis for concluding that Interior has abdicated its trust responsibilities. Since this Court's initial remand order, there have been two evidentiary proceedings– the 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 district court cited no evidence demonstrating that the agency is defaulting on its responsibilities.

The district 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 district court announced that it would treat the factual findings made in its contempt ruling as having been established because, in the district court's view, they had not been set aside by this Court. See Op. 23-24.

The district court's reasoning once more disregards this Court's rulings. This Court vacated the district 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, this Court 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 the district court's contempt ruling with respect to allegedly misleading statements regarding Interior's computer system, this Court found the district 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 district court's decision to assume responsibility for trust reform in general or for the accounting in particular.

### C. The District 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 district 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 this Court's 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 district court's ruling dismissed Congress's concern out of hand. 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.

The following is a brief summary of some of the most significant requirements imposed by the district 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. 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 district 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 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 district 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. 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. 172-76.

4. Statistical Sampling.

In its initial decision, this Court noted that the district 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 that 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 district 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 district court sought to justify its injunction on the basis of the purported dependence of Indian beneficiaries on trust disbursements (see Op. 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 contains a variety of deadlines commencing November 24, 2003, 60 days from the date of the court's injunction.

**Within 60 days of the court's ruling – November 24, 2003:**

- File a detailed plan for identifying trust-related records likely to be possessed by third-parties and for issuing subpoenas to those entities. Order 4.
- File a detailed plan describing, among other things, the quality control measures of the DOI Accounting Plan. Id. at 7-8.

**Within 90 days of the court's ruling – December 24, 2003:**

- File a timetable for completing the collection and indexing of records related to trust accounts, including a complete explanation of indexing methods. Id. at 4.
- File a detailed plan describing each of five system tests described in the DOI Accounting Plan. Id. at 7.
- File a detailed plan including specific measures Interior will take to bring itself into compliance with all of the fiduciary duties imposed upon trustees at common law, as identified by the district court in its opinion. Id. at 9.
- File a detailed plan of measures to correct problems with leasing, title and accounting systems identified in a brief filed by an amicus curiae. Id. at 10.
- Complete 12 specified directives including identification of trust-related documents, implementation of training programs for records custodians, policies for retrieval of trust records, and a request for legislation from Congress to satisfy imbalances of trust fund balances within the United States Treasury. Id. at 12-13.
- 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. Id. at 15

- File a timetable for completion of the entire indexing process of trust-related records to be undertaken as part of the historical accounting. Id.

**By The End of the Year – December 31, 2003:**

- Resolve validation of documentation for automatic disbursement authorizations and establish records retention schedules for non-electronic trust records. Id. at 13-14.

**Within 120 days of the court's ruling – January 23, 2004:**

- File a plan that analyzes, among other things, use of "industry production data bases" in conjunction with an accounting. Id. at 8.
- File a list of tribal laws and ordinances that Interior deems applicable to trust administration together with a full statement of the way that Interior believes that such provisions may affect the administration of the trust. Id. at 10.
- File a detailed plan to identify specific measures to distinguish principal from income as part of historical accounting. Id. at 10-11.

**By March 31, 2004:**

- Complete specified directives including indexing all identified documents under control of the Office of Trust Records necessary to perform an accurate accounting, establishing a Privacy Act Program, and establishing revised records retention schedules for electronic trust records. Id. at 14.

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 the Declaration of 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 district 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 district 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 district 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 district 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 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 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 marked an extraordinary usurpation of executive branch responsibility, without foundation in the record, based on a fundamental misunderstanding of the 1994 Act and this Court's decisions. The new legislation makes entirely clear that the duties reflected in 1994 Act cannot be the basis for the historical accounting ordered by the district 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 the public generally. An immediate stay of the structural injunction is appropriate.

## CONCLUSION

The district court's September 25, 2003 injunction should be stayed pending appeal.

Respectfully submitted,

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NOVEMBER 2003

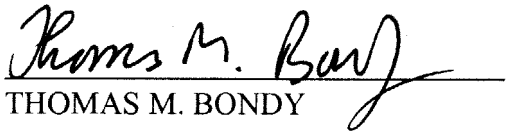
# A D D E N D U M

(Certificate as to parties and amici)

## CERTIFICATE AS TO PARTIES AND AMICI

Pursuant to Circuit Rules 8 and 28(a)(1)(A), undersigned counsel certifies that the named plaintiffs in this action are Elouise Pepion Cobell, Earl Old Person, Mildred Cleghorn, Thomas Maulson, and James Louis LaRose. The district court has certified a plaintiff class consisting of present and former beneficiaries of Individual Indian Money ("IIM") accounts, excluding those who had filed their own actions prior to the filing of the complaint in this case.

Defendants are Gale A. Norton, Secretary of the Interior, Aurene M. Martin, Acting Assistant Secretary of the Interior for Indian Affairs, and John W. Snow, the Secretary of the Treasury.



THOMAS M. BONDY

## CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of November, 2003, I am causing the foregoing *APPELLANTS' MOTION FOR STAY PENDING APPEAL* to be served on the following in the manner specified:

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## INDEX OF EXHIBITS


**Tab**

Declaration of Associate Deputy Secretary James E. Cason (Nov. 10, 2003) . . . . . A

Excerpts of H. R. 2691 and Conference Report 108-330 . . . . . B

Department of Interior's Historical Accounting Plan (Jan. 6, 2003) . . . . . C

Department of Interior's Comprehensive Trust Management Plan (Mar. 28, 2003) . . . . . D