IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO SET DATE CERTAIN FOR TRIAL OF ADEQUACY OF FINAL "ACCOUNTING" FOR NAMED PLAINTIFFS

INTRODUCTION AND SUMMARY

Plaintiffs ask the Court to hold another trial allowing them to challenge, again, a report they challenged in the Phase 1.5 trial with respect to the named plaintiffs and their predecessors. Plaintiffs also urge the Court to schedule the requested trial for the earliest available date.

The motion is remarkable for its studied absence of context. The initial version of what the plaintiffs term the "E&Y Accounting" issued more than three years ago. They apparently refer to the Expert Report of Joseph R. Rosenbaum, dated March 28, 2003. This report, regarding the "Paragraph 19" document collection and submitted in connection with the Phase 1.5 trial, is an updated version of a report first prepared by Mr. Rosenbaum, a partner in the firm Ernst & Young LLP, and provided to plaintiffs in August 2001. We will refer herein to Mr. Rosenbaum's expert report as the "E&Y Report."

The E&Y Report's findings have been of great value in planning and organizing Interior's historical accounting work relating to individual Indian trust funds. The E&Y Report itself was the subject of extensive testimony at the Phase 1.5 trial, at which plaintiffs cross-examined Mr. Rosenbaum over the course of three days and submitted their own rebuttal report and expert testimony. That trial culminated in a ruling that did not accept plaintiffs' premise that an accounting is impossible, but undertook to dictate the scope and means of an accounting in a manner wholly at odds with the present and continuing work of the Department of the Interior (DOI). That ruling resulted in congressional action. Subsequently, the Court of Appeals vacated the Court's injunction with respect to accounting obligations in a decision the plaintiffs fail even to acknowledge. Cobell v. Norton, __ F.3d __, 2004 WL 2828059 (D.C. Cir. Dec. 10, 2004).

As if none of this had occurred, plaintiffs now insist that an immediate trial on the E&Y Report is essential. Plaintiffs give little indication of how that trial would comport with the principles established by the Court of Appeals or what such a trial would accomplish. The Court of Appeals left no doubt that this Court cannot broadly reject Interior's plan as insufficient and impose its own plans instead. In addition, the Court of Appeals' ruling contradicts plaintiffs' understanding that challenges to account statements come with an entitlement to discovery or evidentiary hearings. To the extent that plaintiffs believe they have grounds for setting aside any of the accountings, their arguments (whatever they may be at this juncture) would properly be the subject of briefing that would reflect the guidance provided by the Court of Appeals. To the extent that the E&Y Report casts light on any potential legal arguments, that study has already been examined extensively at trial. To the extent that the named plaintiffs have concerns specific

to their own accounts, they should be identified so that they can be addressed administratively by Interior and ultimately, if necessary, by the Court.

Plaintiffs are vague on all of these points, and the reason is evident. The purpose of plaintiffs' "trial" is not to present concerns with or exceptions to individual account statements but to attempt, for a second time, to demonstrate that an accounting cannot be performed. Based on that premise, plaintiffs ask the Court to adopt alternative "methods" to determine what each member of the class is "owed." Plaintiffs thus invite the Court to engage in precisely the type of enterprise disapproved by the Court of Appeals. Whatever authority the Court may have to compel production of account statements or review them for compliance with law does not vest the Court with authority to adopt models, based on plaintiffs' hypotheses, for imposing liability on the United States.

BACKGROUND

Although the Court is thoroughly familiar with the background of this case, an extremely brief recapitulation, including a review of the most recent D.C. Circuit decision, is appropriate in light of plaintiffs' filing.

A. Interior currently holds approximately $415 million in trust for the benefit of individual Indians. These funds are maintained in about 260,000 separate Individual Indian Money ("IIM") accounts.

In 1994, Congress enacted the American Indian Trust Fund Management Reform Act, Pub. L. No. 103-412, 108 Stat. 4239 ("1994 Act"). Section 102(a) 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 Indian tribe or an individual Indian which are deposited or invested pursuant to the Act of June 24, 1938 [25 U.S.C. § 162a]." 1994 Act, § 102(a), 25 U.S.C. § 4011(a).

Plaintiffs brought this class action in 1996. The government moved to dismiss the complaint, urging that it sought money damages in excess of $10,000. Cobell v. Babbitt, 30 F. Supp. 2d 24, 38-39 (D.D.C. 1998). The Court denied the motion based on representations of class counsel that plaintiffs sought only "an accounting, not a cash infusion" into the IIM accounts. Id. at 40. As the Court explained, plaintiffs' counsel represented that "all of the money that should be held collectively in their IIM accounts is already there; the plaintiffs simply contend the individual account balances are misstated." Id. at 39. Although the Court denied the motion to dismiss, it struck allegations that could be read to seek a cash infusion.

In 1999, this 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 Interior the opportunity to come into compliance. The Court retained jurisdiction for five years, and required Interior to file quarterly reports explaining the steps taken to rectify the breaches found. Cobell v. Babbitt, 91 F. Supp. 2d 1 (D.D.C. 1999).

The Court of Appeals largely affirmed, rejecting the government's contention that Congress had committed to the agency's discretion decisions regarding the extent to which to review transactions that pre-dated the 1994 Act. Cobell v. Norton, 240 F.3d 1081, 1102 (D.C. Cir. 2001).

B. In 2002, this Court held the Secretary of the Interior and an Assistant Secretary in contempt on the basis of DOI's purported failure to initiate an historical accounting and on

claimed inaccuracies in DOI's quarterly reports. Cobell v. Norton, 226 F. Supp. 2d 1 (D.D.C. 2002). Based on its contempt findings, the Court announced that it would not remand to the agency and ordered the government to submit a plan for an accounting as well as a plan for achieving compliance with fiduciary obligations to Indians, to be evaluated by the court with a view to additional orders of structural relief. Id. at 148-49.

In July 2003, the Court of Appeals vacated the contempt ruling. The Court concluded that the contempt order did not fall within the civil contempt authority. The Court held that the record demonstrated that "in her first six months in office Secretary Norton took significant steps toward completing an accounting." Cobell v. Norton, 334 F.3d 1128, 1148 (D.C. Cir. 2003). The Court described the reasoning with respect to the remaining contempt charges as "mystifying," id. at 1149, and "inconceivable," id. at 1150.

Meanwhile, in January 2003, Interior filed accounting and fiduciary obligations compliance plans pursuant to this Court's directive. The Historical Accounting Plan for Individual Indian Money Accounts ("Accounting Plan") set out the agency's program to complete an accounting within five years at a cost of $335 million, subject to congressional appropriations. The Fiduciary Obligations Compliance Plan addressed in detail how Interior was complying and intended to comply with its fiduciary obligations as they related to accounting for trust funds. Interior later submitted, for the Court's information, its Comprehensive Trust Management Plan ("Comprehensive Plan"), which included the matters addressed in the Fiduciary Obligations Compliance Plan and addressed the management of trust lands and the tribal trusts as well.

This Court conducted the Phase 1.5 trial beginning in May 2003, and in September 2003, it issued a "structural injunction" encompassing both the performance of an accounting and the

implementation of a broad program of trust reform. Cobell v. Norton, 283 F. Supp. 2d 66 (D.D.C. 2003).

The government appealed. Congress responded to the injunction with new legislation enacted as part of the FY 2004 Interior appropriations statute, Pub. L. No. 108-108. The Court of Appeals stayed this Court's injunction pending appeal.

C. On December 10, 2004, the Court of Appeals vacated the injunction except insofar as it requires the submission of Interior's "To-Be" Plan.

The Court of Appeals concluded that the passage of Pub. L. No. 108-108 had deprived the historical accounting order of a legal basis.[1] The Court explained that "[t]he provision's legislative history makes clear that Congress passed it in response to [this Court's September 2003 ruling] to clarify Congress's determination that Interior should not be obliged to perform the kind of historical accounting the district court required." Cobell v. Norton, __ F.3d __, 2004 WL 2828059, at *3 (D.C. Cir. Dec. 10, 2004). The Court cited the conference committee's statement that "'[i]nitial estimates indicate that the accounting ordered by the Court would cost between $6 billion and $12 billion,'" and the committee's rejection of "'the notion that in passing the American Indian Trust [Fund] Management Reform Act of 1994 Congress had any intention of ordering an accounting on the scale of that which has now been ordered by the Court.'" Id.

1/ That enactment provided that "nothing in the American Indian Trust [Fund] Management Reform Act of 1994, Public Law 103-412, or in any other statute, and no principle of common law, shall be construed or applied to require the Department of the Interior to commence or continue historical accounting activities with respect to the Individual Indian Money Trust until the earlier of the following shall have occurred: (a) Congress shall have amended the American Indian Trust [Fund] 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."

(quoting H.R. Conf. Rep. 108-330, at 117). The Court noted that committee's determination that "'[s]uch an expansive and expensive undertaking would certainly have been judged to be a poor use of Federal and trust resources.'" Id. (quoting H.R. Conf. Rep. 108-330, at 118).

The Court noted that, in addition,

> individual legislators said in effect that the disparity between the costs of the judicially ordered accounting, and the value of the funds to be accounted for, rendered the ordered accounting, as one senator put it, "nuts": "If this is a $13 billion fund, or somewhere in the neighborhood of $13 billion, would the Native Americans want us to begin a process in which we spend up to $9 billion to hire accountants and financial folks and others to sift through these accounts? I think that is just nuts. That doesn't make any sense at all to anybody." 149 Cong. Rec. at S13,786 (2003) (statement of Sen. Dorgan). See also id. at S13,785 (statement of Sen. Burns) ("If there is one thing with which everybody involved in this issue seems to agree, it is that we should not spend that kind of money on an incredibly cumbersome accounting that will do almost nothing to benefit the Indian people.").

Id. at *4.

The Court of Appeals recognized that absent congressional action by December 31, 2004, Pub. L. No. 108-108 would "cease to bar the historical accounting provisions of the injunction." The Court stated: "We do not address the issues that would be relevant if the district court then reissued those provisions." Id. at *6.[2]

The Court then vacated the remainder of this Court's ruling (with the exception of the requirement that the government file its To-Be Plan). In so doing, the Court addressed the manner in which common law trust duties may inform statutory duties and made clear that general limitations on judicial review of agency action apply in this litigation.

[2/] The Consolidated Appropriations Act, 2005, H.R. 4818, 108th Cong. (2004), does not contain the language of Pub. L. No. 108-108 which expired on December 31, 2004. The legislation had been passed by both Houses of Congress prior to the Court of Appeals decision, and the government had advised the Court accordingly.

After noting the "litigation innovation" of "requiring defendants to explain how they will cure a long list of defaults as to which the court has made no evidence-based finding," the Court of Appeals observed that this Court had "abstracted the common law duties from any statutory basis." Id. at *9. The Court explained that common law trust duties could not be incorporated on a wholesale basis. Instead, "once a statutory obligation is identified, the court may look to common law trust principles to particularize that obligation." Id. at *9. The Court observed that this Court had recognized that principle in its declaratory judgment decision, "finding that it could not grant plaintiffs' prayer for a declaration of all trust duties arising from the IIM trust solely on the basis of plaintiffs' common law trust claims." Id. at *10 (citing 91 F. Supp.2d at 38). The Court of Appeals observed that this Court "subsequently reversed itself on the point, saying that our decision in Cobell VI 'supercedes' the district court's prior observation that plaintiffs were wrong to think that once a trust relationship was established they could automatically 'invoke all the rights that a common law trust entails.'" Id. (quoting 283 F. Supp. 2d at 260 n.12). The Court of Appeals declared that "[i]nsofar as plaintiffs may have said that, they were wrong," explaining that the Court's 2001 opinion "actually held that the government's duties must be 'rooted in and outlined by the relevant statutes and treaties,' 240 F.3d at 1099, although those obligations may then be 'defined in traditional equitable terms,' id." 2004 WL 2828059, at *10.

The Court also made clear that the fiduciary nature of the duties at issue did not vitiate the normal structure of judicial review of agency action. Citing the Supreme Court's recent decision in Norton v. Southern Utah Wilderness Alliance, 124 S. Ct. 2373 (2004), the Court noted that "[t]he APA's requirement of 'discrete agency action,' . . . was to protect agencies from undue

judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve." 2004 WL 2828059, at *10 (quoting Southern Utah, 124 S. Ct. at 2381). The Court explained:

> "If courts were empowered to enter general orders compelling compliance with broad statutory mandates, they would necessarily be empowered, as well, to determine whether compliance was achieved--which would mean that it would ultimately become the task of the supervising court, rather than the agency, to work out compliance with the broad statutory mandate, injecting the judge into day-to-day agency management . . .. The prospect of pervasive oversight by federal courts over the manner and pace of agency compliance with such [broad] congressional directives is not contemplated by the APA."

Id. at *11 (quoting Southern Utah, 124 S. Ct. at 2381).

The Court of Appeals noted two additional factors at odds with the view that more expansive judicial oversight was permissible because of proposed analogies to the duties of private trustees. The Court noted that "while the expenditures that plaintiffs seek are to be made out of appropriated funds, trust expenses for private trusts are normally met out of the trust funds themselves," so that "plaintiffs here are free of private beneficiaries' incentive not to urge judicial compulsion of wasteful expenditures." Id. at *11. The Court further noted that "private trustees, even though held to high fiduciary standards, are generally free of direct judicial control over their methods of implementing these duties, and trustee choices of methods are reviewable only 'to prevent an abuse by the trustee of his discretion.'" Id.

Applying these principles, the Court of Appeals stressed that it is not the role of a court to assume control over the conduct of an agency's duties if it determines that its plans fail to comply with those legal duties. The Court of Appeals noted that this Court had "used language suggesting an intent to take complete charge of the details of whatever plan Interior might

submit: 'If the court [concludes that the plan will not satisfy defendants' legal obligation], it may decide to modify the institutional defendant's plan, adopt a plan submitted by another entity, or formulate a plan of its own that will satisfy the defendant's liability.'" Id. at *13 (quoting 283 F. Supp. 2d at 142). The Court of Appeals declared that "[t]his is in sharp contrast with Southern Utah's point that '§ 706(1) empowers a court only to compel an agency . . . to take action upon a matter, without directing how it shall act.'" Id. (quoting 124 S. Ct. at 2379) (emphasis in original).

The Court of Appeals determined that the requirement that Interior file a To-Be Plan "in some respects continues or logically extends the original order to file the Comprehensive Plan," which the Court's 2003 decision had upheld as 'akin to an order . . . relat[ing] only to the conduct or progress of litigation.'" Id. at *12 (quoting Cobell v. Norton, 334 F.3d 1128, 1138 (D.C. Cir. 2003)). The Court stressed, however, that the plan could not be used "as a device for indefinitely extended all-purpose supervision of the defendants' compliance with the sixteen general fiduciary duties listed." Id. The Court of Appeals held that "[t]he court's authority is limited to considering specific claims that Interior breached particular statutory trust duties, understood in light of the common law of trusts, and to ordering specific relief for those breaches." Id. at *16.

ARGUMENT

Because Plaintiffs' motion concerns matters subject to the Court of Appeals' December 10, 2004 decision, for which no mandate has issued, this Court's observation in denying Plaintiffs' Request for Emergency Status Conference Regarding the Security of Electronic Trust Records (filed Dec. 3, 2004) that "both the status of the Court's prior Orders and its authority to act in this case going forward are uncertain at this time" remains apt. Dec. 20, 2004 Order at 2.

Therefore, until the mandate issues, this Court lacks jurisdiction, and Plaintiffs' motion should be denied on that basis alone. However, in the event of issuance of the mandate in the interim, defendants also submit the following grounds for denying plaintiffs' motion.

I. Plaintiffs' Motion Asks This Court To Disregard The Most Recent Decision Of The Court Of Appeals And The Scope Of This Court's Jurisdiction And Should Be Denied.

The guidance provided by the Court of Appeals in addressing the "Fixing the System" component of this Court's September 2003 Order is equally pertinent to challenges to the production of account statements. The ruling defines the proper mode of procedure in this case and appropriate analysis to govern substantive challenges.

The Court of Appeals' opinion leaves no doubt that the principles governing judicial review of executive branch action, reaffirmed in Southern Utah, apply in this case. As the Court of Appeals stressed, "'§ 706(1) empowers a court only to compel an agency . . . to take action upon a matter, without directing how it shall act.'" Id. at *13 (quoting 124 S. Ct. at 2379) (emphasis in original).

This Court's 1999 declaratory judgment ruling was such an order. It compelled action unreasonably delayed, based on the facts as they existed at that time, and the order was affirmed on that basis.

The Court of Appeals' decision makes clear that a finding of this kind does not prospectively alter the basic relationship between a court and an agency. Substantive disagreements regarding subsequent agency action are to be resolved in accordance with governing principles of judicial review. A court may review final agency action for alleged failure to comply with law. Or, if an agency fails to act, the court may direct action. But a court

may not intervene in the ongoing process of agency action to set aside the agency's determinations on issues of substance and procedure and impose its own.

Thus, the Court of Appeals explicitly rejected the framework established by this Court in its analysis of the government's Accounting Plan. The Court of Appeals cited this Court's statement that, "'[i]f the court [concludes that the plan will not satisfy defendants' legal obligation], it may decide to modify the institutional defendant's plan, adopt a plan submitted by another entity, or formulate a plan of its own that will satisfy the defendant's liability.'" Id. at *13 (quoting 283 F. Supp. 2d at 142). The Court of Appeals admonished that "[t]his is in sharp contrast with Southern Utah's point that '§ 706(1) empowers a court only to compel an agency . . . to take action upon a matter, without directing how it shall act.'" Id. (quoting 124 S.Ct. at 2379) (emphasis in original).

The Court of Appeals also contrasted this Court's recognition in its 1999 declaratory judgment opinion of the respective roles of the court and the agency, with its September 2003 ruling. The Court of Appeals contrasted its earlier approval of this Court's "expression of intent to leave [the] issue of choice of accounting methods, including statistical sampling, to administrative agencies," id. at *11 (citing 240 F.3d at 1104), with this Court's September 2003 order "forbidding use of statistical sampling." Id. (citing 283 F. Supp. 2d at 289); see also 240 F.3d at 1108, 1109 (accepting the government's contention that "mandatory injunctive relief akin to that provided in a writ of mandamus" is inappropriate because the case involves no "clear, specific, 'ministerial' duties," and affirming because this Court had remanded to the agency, acknowledging that it could not become "enmeshed in the minutiae of agency administration").

The Court of Appeals' holdings with respect to the source of discrete enforceable duties are likewise apposite to an understanding of Interior's responsibilities in producing account statements. While it may be that "interpretation of statutory terms is informed by common law trust principles," id. at *11, interpretation of statutory terms does not provide license for a wholesale importation of common law duties based on imperfect analogies to the position of a private trustee. At bottom, the question is one of congressional intent. And, as the Court of Appeals was at pains to observe, the legislative history of Pub. L. No. 108-108 "makes clear that Congress passed it in response to [this Court's September 2003 decision] to clarify Congress's determination that Interior should not be obliged to perform the kind of historical accounting the district court required." Id. at *3 (emphasis added).

Contrary to plaintiffs' wholly unsupported claim that Interior refuses to provide accountings to any beneficiaries, Interior has continued to complete account statements notwithstanding this Court's 2003 injunction and the carefully defined restrictions on spending contained in Interior's 2004 appropriations.[3] As of November 1, 2004, Interior had completely reconciled over 30,000 of 80,539 judgment IIM accounts either open as of 12/31/00 or open on 10/25/94 and closed before 12/31/00. Status Report to the Court Number Nineteen, Nov. 1, 2004, at 15-17. Of the 19,033 per capita accounts in the same categories, 5,255 had been completely reconciled as of September 30, 2004. Id. at 19-20. For land-based accounts, Interior

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[3] The 2004 appropriations provision, enacted in the wake of this Court's injunction, "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").

completed its collection of supporting documentation for "Electronic Era" (1985 to present) transactions exceeding $100,000 and for a random set of transactions from a random sample of accounts. Id. at 20-21.

The Consolidated Appropriations Act, 2005, H.R. 4818, 108th Cong. (2004), does not contain the stringent limitations on Interior's use of funds contained in the FY 2004 appropriations provision. The legislation appropriates $196,267,000 to Interior's Office of Special Trustee for American Indians "[f]or the operation of trust programs for Indians by direct expenditure, contracts, cooperative agreements, compacts, and grants, . . . of which not to exceed $58,000,000 shall be available for historical accounting." Title I (Office of Special Trustee for American Indians, Federal Trust Programs). The legislation further specifies that "total funding for historical accounting activities shall not exceed amounts specifically designated in this Act for such purpose." Id. § 112.

Accordingly, Interior is pressing forward with the completion of account statements and the work that will provide all account holders with the statements described in its Accounting Plan.

Without regard to or even mention of any of these developments, plaintiffs now ask for an immediate trial date to review the report first submitted by Mr. Rosenbaum in 2001. Plaintiffs invite the Court to undertake a mode of proceeding disapproved by the Court of Appeals, and they do so, ironically, by asking the Court to revisit arguments and evidence plaintiffs pressed unsuccessfully at the Phase 1.5 trial.

Plaintiffs ask this Court to inject itself into the ongoing process of preparing account statements to put a halt to that process and substitute a process deemed suitable by plaintiffs and the Court. The Court of Appeals rejected this very course in its December 10, 2004 decision.

Indeed, undaunted by the Court of Appeals' opinion, plaintiffs present precisely the same arguments that they offered to this Court in the Phase 1.5 trial. The gravamen of plaintiffs' argument is that they will demonstrate that an accounting cannot be performed and that this Court should, therefore, devise alternative methods for securing them payment of monies allegedly owed. Motion at 6. This is identical to the assertion in their Phase 1.5 Pretrial Statement, Apr. 22, 2003, at 12-13, that plaintiffs seek a declaration that defendants cannot perform an accounting and ask the Court to adopt alternative methods.

Perhaps sensing the obvious difficulties with this approach, plaintiffs state that "[e]ven if the accounting is affected in some inexplicable and heretofore unexplained way by the APA, the E&Y accounting is in APA parlance a 'final agency action,' and, as such, reviewable at once." Motion at 7.

This kind of statement does the Court a grave disservice. Plaintiffs might argue that the E&Y Report constitutes final agency action.[4] But to suggest, in the wake of the uncited Court of

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[4] Such an argument cannot succeed, however. The E&Y Report is an expert witness report commissioned to assess the massive "Paragraph 19" document collection undertaken as part of this litigation. E&Y Report at 1-2. Reports are not "agency action" within the meaning of the APA. See Natural Resources Defense Council, Inc. v. Hodel, 865 F.2d 288, 316-19 (D.C. Cir. 1988); Guerrero v. Clinton, 157 F.3d 1190, 1196 (9th Cir. 1998); Chem. Weapons Working Group, Inc. v. U.S. Dep't of the Army, 111 F.3d 1485, 1495 (10th Cir. 1997), citing Am. Trucking Ass'n v. United States, 755 F.2d 1292, 1297 (7th Cir. 1985) (agency reports do not constitute "agency action"); Natural Resources Defense Council v. Lujan, 768 F. Supp. 870, 881-82 (D.D.C. 1991). See also Taylor Bay Protective Ass'n v. EPA, 884 F.2d 1073, 1081 (8th Cir. 1989); Greenpeace USA v. Stone, 748 F. Supp. 749, 765-66 (D. Haw. 1990), appeal dismissed as moot, 924 F.2d 175 (9th Cir. 1991).

Appeals' decision, that application of APA principles to this case is "inexplicable and heretofore unexplained," flagrantly disregards the law of the case.

II. Plaintiffs Have No Right To Discovery Or A Trial.

Even if the E&Y Report constituted final agency action providing the accountings that the 1994 Act requires, whatever rights plaintiffs may have to challenge such accountings in this Court must derive from the Administrative Procedure Act ("APA"). The right to bring a challenge under the APA does not suggest that a litigant has a right to discovery or a trial. As a threshold matter, review under the APA is generally confined to the administrative record. See Florida Power & Light Co. v. Lorion, 470 U.S. 729, 743-44 (1985) ("The task of the reviewing court is to apply the appropriate APA standard of review, 5 U.S.C. § 706, to the agency decision based on the record the agency presents to the reviewing court."). Plaintiffs' arguments for setting aside the accountings can be resolved by briefing as informed by the Court of Appeals' decision.[5]

"Challengers to agency action are not . . . ordinarily entitled to augment the agency's record with either discovery or testimony presented in the district court." Marshall County

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In this case, Congress noted that the E&Y Report would help to determine whether the costly effort to collect these documents "was a wise use of appropriated funds, and [would] serve as a benchmark to determine any future appropriations for this type of activity." (November 20, 2001 letter from the Chairman of House Subcommittee on Interior); see also Interior's Accounting Plan at III-12; Interior's Report to Congress on the Historical Accounting of Individual Indian Money Accounts, July 2, 2002, at 37. The E&Y Report might thus constitute part of an administrative record underlying an agency action but is not itself agency action.

[5] Judicial review can be greatly facilitated in this case through administrative proceedings. It is worth noting that Interior is considering the issuance of regulations to set up administrative processes for challenging historical statements of account at the administrative level and, in that regard, has sent out letters in the form of Exhibit A hereto in accordance with Interior's tribal consultation policy.

Health Care Authority v. Shalala, 988 F.2d 1221, 1226 (D.C. Cir. 1993). Plaintiffs, who barely acknowledge that the APA has any applicability to this case, provide the Court no justification to authorize discovery or conduct a trial. Moreover, "[e]ven on those rare occasions when that is appropriate, the district court is not engaged in ordinary fact-finding, but instead is filling in gaps in the record to determine what the agency actually did." Id. at 1227. Plaintiffs trial concept, however, is far grander. Plaintiffs would inquire into unspecified factual issues to support a request that the Court declare the agency actions substantively invalid and impossible to perform, compel substitution of completely different actions, and extend that requirement from a relatively few accounts to the entire class.

Besides exceeding the limits of APA review noted above, plaintiffs' theory – that based on a review of the E&Y Report, the Court may conclude that no accountings are possible – contradicts the Court's prior finding that "the work Ernst & Young performed on the accounts of the five named plaintiffs does not represent an effort on the part of the defendants to perform a historical accounting for the thousands of IIM trust beneficiaries." Cobell v. Norton, 226 F. Supp. 2d 1, 115-16 (D.D.C. 2002), vacated on other grounds, 334 F.3d 1128 (D.C. Cir. 2003). The Court further noted that "[n]otwithstanding the fact that the work performed by Ernst & Young may prove to be valuable in terms of providing those plaintiffs with an accounting, the work was not meant to be part of a larger historical accounting project." Id. Thus, even if the E&Y Report constituted "agency action" within the meaning of the APA,[6] it would not be

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[6] See note 4 above. In regard to what is agency action, the E&Y Report may be distinguishable from work Interior performed to refine the account reconciliation work reflected in the E&Y Report, see Status Report to the Court Number 17, May 3, 2004, at 21, and from historical accounting work Ernst & Young performed for Interior relative to some of the accounts within the scope of the E&Y Report, see Status Report to the Court Number Thirteen, May 1, 2003, at

appropriate to review it for purposes of invalidating the entire accounting project as plaintiffs urge.[7]

Furthermore, it is entirely unclear what justification exists to subject the E&Y Report to discovery and testimony beyond what the Court has already authorized and heard. The E&Y Report was first provided to plaintiffs in August 2001. See Letter from Levitas to Most of 8/27/01. In 2003, Defendants designated Joseph Rosenbaum, the Ernst & Young LLP partner and author of the E&Y Report, as an expert witness at the Phase 1.5 trial and filed his report in accordance with the Phase 1.5 trial scheduling order. See Phase 1.5 Trial Discovery Schedule Order, Oct. 17, 2002; Defendants' List of Testifying Experts for Phase 1.5 Trial, Feb. 28, 2003; Interior Defendants' Notice of Filing Under Seal of Expert Report of Joseph R. Rosenbaum, Feb. 28, 2003. Plaintiffs inexplicably chose to not take Mr. Rosenbaum's deposition even though they deposed other experts designated by the defendants. In their motion, plaintiffs fail to explain why they should now be permitted to take discovery they previously waived.

Mr. Rosenbaum testified for three days (June 9-11, 2003) during the Phase 1.5 trial, and plaintiffs' lengthy cross-examination of Mr. Rosenbaum, which comprises more than seventy

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30; Status Report to the Court Number Fifteen, Nov. 3, 2003, at 28. But even if such other activities constituted "agency action," such action is not "final," and in any event, is not of sufficient scope to be applicable, in the manner plaintiffs propose, to the "larger historical accounting project."

[7] Plaintiffs also ignore that the very nature of the Phase 2.0 trials they demand will require decertification of the case as a class action. The issues in such trials would be rooted in the unique statements of account that class members will receive for each account they hold, meaning that commonality would no longer exist. Some class members may be wholly satisfied with the outcome of their accountings and desire no changes, while some class members might demand changes that would be contrary to the interests of others. This likely conflict among class members would require decertification before trial.

percent of his testimony, challenged the E&Y Report and explored the theory of "impossibility" they now reassert. See Tr., June 10, 2003, a.m., at 6:25-94:1 (cross-examination challenging sufficiency of data relied on in E&Y Report); Tr., June 10, 2003, p.m., at 6:10-130:23 (same); Tr., June 11, 2003, a.m., at 4:10-91:9 ; Tr., June 11, 2003, p.m., at 6:12-63:10 (same); see also Tr., July 8, 2003, a.m. at 24:16-25:16 (plaintiffs' counsel arguing that, notwithstanding the E&Y Report, it is "impossible" to audit trust records); id. at 34:3-37:18 (purporting to set forth defects in the E&Y Report and claiming that such defects are "what is missing from the accounting"); id. at 40:1-40:5 ("And with regard to the accounting, it is impossible. It is not impossible because of inadvertent mistake or error; it is impossible because of the deliberate destruction and the callous disregard for trust duties for generations.")

The data that formed the basis for the E&Y Report was gathered by Interior (and Treasury) with the assistance of a team headed by Robert Brunner, who was then with Arthur Andersen and later KPMG. Through this process, approximately eighty sites were identified at which potentially relevant documents might be located, and relevant documents were then identified based on names, account numbers, tract numbers and lease numbers. Tr., June 6, 2003, p.m., at 54:6-54:8, 56:11-57:7. The comprehensiveness of the data collection and the quality control measures employed to ensure its integrity exceeded industry practices, and Interior collected approximately 160,000 documents. Id. at 47:3-51:6, 61:11-62:4, 66:5-66:7.

Plaintiffs' own expert, Mr. Homan, sought to rebut Mr. Rosenbaum's report in his own expert report and extensive trial testimony. See Pls.' Ex. 36 (Plaintiffs' Expert Report (Rebuttal) of Paul M. Homan); Tr., May 1, 2003, a.m., at 73:5-10; Tr., May 1, 2003, p.m., at 31:7-33:15, 64:11-66:9; Tr., May 2, 2003, p.m., at 42:23-47:22; Tr., May 5, 2003, a.m., at 9:11-10:16 (direct

examination of Paul Homan); Tr., May 7, 2003, a.m., 13:11-14:25; Tr., May 7, 2003, p.m., at 69:16-112:25 (cross-examination of Paul Homan).

Thus, even if plaintiffs were to make the case for review of the E&Y Report outside the administrative record – which they have not done – they have already had a full and fair opportunity to develop whatever additional facts they believe such review should include.

III. The Trial Plaintiffs Propose Would Be Prohibited In This Court.

Finally, an APA challenge to an account statement cannot, by sleight-of-hand, be converted into a request that the Court devise "methods" (presumably along the lines of plaintiffs' previously proposed revenue model) for determining what they are "owed." See Plaintiffs' Plan for Determining Accurate Balances in the Individual Indian Trust, Jan. 6, 2003. The 1994 Act requires Interior to "account for the daily and annual balance of all funds held in trust by the United States for the benefit of an Indian tribe or an individual Indian which are deposited or invested pursuant to the Act of June 24, 1938 [25 U.S.C. § 162a]." 1994 Act, § 102(a), 25 U.S.C. § 4011(a). However, Congress did not authorize a court to conclude that no satisfactory accounting is possible and, on that basis, to adopt models for determining liabilities to impose on the Treasury. Moreover, in proposing to recast the case in this fashion, plaintiffs appear to abandon the premises on which this Court originally concluded that it could properly exercise jurisdiction. In denying the government's motion to dismiss in 1998, the court relied on the representations of class counsel that plaintiffs sought only "an accounting, not a cash infusion" into the IIM accounts. 30 F. Supp. 2d at 40. As the Court explained, plaintiffs' counsel represented that "all of the money that should be held collectively in their IIM accounts is already there; the plaintiffs simply contend that the individual account balances are misstated." Id. at 39.

If these representations are no longer accurate, it is incumbent on class counsel to say so clearly. To the extent that plaintiffs now claim that any accounting furnished pursuant to the 1994 Act will be inadequate, and that they are entitled to a monetary recovery based on common law theories, serious questions about this Court's jurisdiction would be raised. Conversely, if the representations of class counsel in 1998 continue to be true, many of the assertions and proposals contained in plaintiffs' present motion are difficult to comprehend.

CONCLUSION

For the reasons stated above, the Court should deny Plaintiffs' Motion to Set Date Certain for Trial of Adequacy of Final "Accounting" for Named Plaintiffs.

Dated: January 13, 2005

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on January 13, 2005 the foregoing *Defendants' Opposition to Plaintiffs' Motion to Set Date Certain for Trial of Adequacy of Final "Accounting" for Named Plaintiffs* was served by Electronic Case Filing, and on the following who is not registered for Electronic Case Filing, by facsimile:

Earl Old Person (*Pro se*)
Blackfeet Tribe
P.O. Box 850
Browning, MT 59417
Fax (406) 338-7530

/s/ Kevin P. Kingston
Kevin P. Kingston

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

September 8, 2004

Dear Tribal Leader,

The purpose of this letter is to initiate consultation with your Tribe about an administrative appeal process that would apply to recipients of statements prepared by the Department of the Interior (Interior) that report the transactions (receipts, interest earned, disbursements and the like) in tribal trust accounts and in Individual Indian Money (IIM) accounts.

We are sending this letter to tribal entities. **This letter is not intended to be read by or acted upon by any members of the class of plaintiffs in Cobell v. Norton.** If the individual opening or receiving this letter on behalf of the Tribe is a class member (that is, a person who, as of February 4, 1997, was a present or former beneficiary of an IIM account), this letter is not intended to be read or acted upon by you and should be passed on, unread, to a representative of the Tribe who is not a class member. See Cobell v. Norton, 212 F.R.D. 14, 24 (D.D.C. 2002) ("the parties to this litigation, their agents and officials, and their counsel shall not communicate, through the United States mail or any other mode of communication, with any class member in this litigation regarding this litigation or the claims involved therein, except as specifically permitted by order of this Court").

As you know, Interior manages money held in trust for Tribes in their tribal trust accounts and for individual Indians in their IIM accounts. Interior is required by law to provide both tribal account holders and IIM account holders with quarterly statements of performance that report the most recent transactions in their accounts. Such statements of performance are prepared by the Office of the Special Trustee for American Indians (OST). In addition, Interior is preparing historical statements of account for certain account holders that will reflect the transactions in their accounts for periods prior to December 31, 2000. Such historical statements of account are being prepared by the Office of Historical Trust Accounting (OHTA).

Secretarial Order No. 3242, dated September 5, 2002, clarified that the administrative appeal process applicable to actions of the Bureau of Indian Affairs (BIA) would be applicable to appeals from historical accountings by OHTA. That Secretarial Order directed the Interior Board of Indian Appeals (IBIA) in the Office of Hearings and Appeals to exercise administrative review of such accountings by OHTA. Secretarial Order No. 3242 expired by its own terms on July 1, 2003. Interior now is considering whether to issue a regulation that would provide administrative processes for challenging historical statements of account prepared by OHTA or statements of performance issued by OST, in order to resolve errors at the administrative level to the extent possible and to make it easier and less expensive for account holders to obtain review. In accordance with Interior's tribal consultation policy, we respectfully request that any comments or ideas your Tribe may have be submitted to us within 60 days of the date of this

letter. Once that 60-day period closes and we have had an opportunity to consider fully all of the comments received from the Tribes, Interior intends to begin a notice and comment rulemaking that would formally propose such an administrative appeal process. You will, of course, have a separate opportunity during rulemaking to comment specifically on such a proposed rule. An overview of the current administrative appeals process for certain decisions relating to Indian affairs, and how it may be adapted to trust account statements, follows immediately below.

Administrative Appeals

Under existing law and regulation, various decisions made by BIA officials may be appealed to IBIA, as provided in 25 Code of Federal Regulations (C.F.R.) Part 2. As a general rule, appeals taken from BIA decisions require the would-be appellant to give notice to the same BIA office that made the decision at issue. In some instances, that same office will review the appellant's submission and provide its final views on the matter. In all cases, only after the appellant takes that BIA office's action through the final level of review within Interior and obtains Interior's final decision may the appellant, if he or she chooses, seek review of Interior's decision in federal court.

Interior is considering adopting an analogous appeal process for recipients of trust account statements from OST or OHTA. The process would provide that, before appeals can be taken to IBIA, the account holder first present all questions or concerns about any OST quarterly statement of performance or OHTA historical statement of account to the office that generated and mailed that statement, in order to give that office an opportunity to reconsider its initial determination. Thus, for quarterly statements of performance, the account holder would contact a designated official within OST, as would be explained in the mailing accompanying that statement. For historical statements of account, the account holder would contact a designated official within OHTA.

In both instances, the account holder would be required to make that initial contact within some specific period of time and then provide OST or OHTA with all supporting materials (as applicable) to explain the reasons for the specific question or concern. The designated official would (once again, within a specific time period) either produce a written decision explaining why the original statement was correct or issue a revised statement. If the account holder is not satisfied with that response, under certain circumstances the account holder may request review of the matter at a second level, again within a specified time period. If no second-level review is available (under circumstances to be spelled out in the final appeal process) or if it still did not produce a decision satisfactory to the account holder, the matter next could be appealed to IBIA. The existing provisions of 43 C.F.R. Part 4 would govern such appeals before IBIA, unless modified for the account statement appeals process.

As indicated above, Interior respectfully requests that your Tribe submit any comments or concerns in writing within 60 days of the date of this letter. We are interested in your general views on this concept as a whole, as well as any specific suggestions on details such as (but not

limited to) the precise period of time to be specified for each stage of the appeal process; whether the process should be different for OST quarterly statements and for OHTA historical statements of account; and whether a second-level review should be mandatory within OST and/or OHTA before any appeal may be taken to IBIA. Please direct your written comments to Bert T. Edwards, Executive Director, Office of Historical Trust Accounting, 1801 Pennsylvania Avenue, NW - Suite 500, Washington DC 20006 (telephone 202-327-5300), and they will be routed for consideration. Thank you for your participation in this consultative process.

Ross O. Swimmer
Special Trustee for
American Indians

Bert T. Edwards
Executive Director
Office of Historical Trust Accounting

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 to Set Date Certain for Trial of Adequacy of Final "Accounting" for Named Plaintiffs*, Dkt. 2798. Upon consideration of Plaintiffs' Motion, Defendants' Opposition, any Reply thereto, the applicable law 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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