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

No. 05-5068

ELOUISE PEPION COBELL, et al.,
Plaintiffs-Appellees,

v.

GALE A. NORTON, SECRETARY OF THE INTERIOR, et al.,
Defendants-Appellants.

COMBINED RESPONSE TO APPELLANTS' EMERGENCY MOTION FOR STAY AND EXPEDITION AND PLAINTIFFS-APPELLEES' MOTION TO REMAND

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I. INTRODUCTION

Secretary Norton and other Trustee-Delegates have filed yet another interlocutory appeal in an effort to evade accountability for their continuing breaches of fiduciary duty. As part of their unrelenting strategy of delay, Defendants-Appellants also have moved the Court to stay the injunction the District Court issued on February 23, 2005 until after this latest appeal is decided. *See Cobell v. Norton*, No. 96-1285, 2005 WL 419293 (D.D.C. Feb. 23, 2005).[1]

Defendants-Appellants request this Court's entry of such extraordinary relief even though the District Court denied the issuance of a stay just three weeks ago, concluding that "[t]he defendants have not demonstrated . . . they are entitled to such relief." *Cobell,* 2005 WL 419293, at *7. Observing that "[e]lderly class members' hopes of receiving an accounting in their lifetimes are diminishing year by year as the government fights – and re-fights – every legal battle," the District Court instead urged that the appeal be expedited (without staying the February 23 injunction) "while there is still a chance to provide meaningful relief to these Indians who have been so grievously wronged by the government's misconduct." *Cobell*, 2005 WL 419293, at *7-*8.

So here, Trustee-Delegates' request for a stay should be denied for several ***independent*** reasons.[2] To begin with, Trustee-Delegates now concede (contrary to their previous position below) that compliance with the injunction is effectively impossible. Plaintiff-Beneficiaries agree and indeed so

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[1] Although Trustee-Delegates' motion is styled as an "emergency," clearly it is ***not*** that. Circuit Rule 27(f) expressly provides that a request for such expedited consideration must include a showing that relief is needed "***to avoid irreparable harm***." (Emphasis added). The Motion to Stay before the Court contains no reference to Trustee-Delegates being at risk of "irreparable harm," and this is because there is ***none***.

[2] The District Court's denial is entitled to deference. *See Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931-32 (1975); *Smith, Bucklin & Assoc., Inc. v. Sountag*, 83 F.3d 476, 479 (D.C. Cir. 1996). The same standard applies to a stay pending appeal and a preliminary injunction. *See Hilton v. Braunskill*, 481 U.S. 770, 776 (1987), *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 842 (D.C. Cir. 1977). In particular, the lower court's findings of fact pertaining to the stay decision are reviewed under the most deferential "clearly erroneous" test; and the determination and balance of the factors of the harm to the parties and the public interest under the deferential "abuse of discretion" standard. *See Seveno Labs, Inc. v. Shalala*, 158 F.3d 1313, 1328 (D.C. Cir. 1998). The District Court's refusal to permit further delay in the enforcement of Trustee-Delegates' accounting obligations was based on overwhelming record (including the evidence presented during the 44-day 1.5 bench trial), and it should ***not*** be disturbed.

argued when the District Court initially imposed the structural injunction. Because the District Court did not address the impossibility issue, and because courts of equity do not enter or enforce impossible decrees, the case should be remanded to the District Court for further proceedings.[3]

In addition, Trustee-Delegates' stay application is premature. The injunction's principal requirement is simply that Trustee-Delegates develop and submit specified plans to the District Court – an approach upheld in *Cobell v. Norton*, 392 F.3d 251, 474 (D.C. Cir. 2004) (hereinafter "*Cobell XIII*"). Such an obligation in no way constitutes immediate and irreparable injury warranting a stay.

Trustee-Delegates also fall far short of satisfying the stringent requirements for the issuance of a stay. In an unsuccessful attempt to demonstrate the appeal has sufficient merit to warrant the imposition of such relief, Defendants-Appellants have resurrected many of the same legal arguments that this Court considered and explicitly rejected four years ago in *Cobell VI*, 240 F.3d 1081 (D.C. Cir. 2001) (hereinafter "*Cobell VI*"). They also argue that the Court's decision in *Cobell XIII* constrains the ability of the District Court to remedy breaches of declared trust duties when ***clearly*** this is ***not*** so. And, they avoid making even a passing reference to *Cobell XII* anywhere in their 20-page Motion – presumably because this Court's December 3, 2004 decision recognizes and reaffirms the District Court's "authority to exercise its discretion as a court of equity in fashioning a remedy to right a century-old wrong" and its "substantial latitude, ***much more so than in the typical agency case***, to fashion an equitable remedy because the underlying lawsuit is both an Indian case and a trust case in which the trustees have egregiously breached their fiduciary duties." *Cobell v. Norton*, 391 F.3d 251, 257-58 (D.C. Cir. 2004) (emphasis added) (hereinafter "*Cobell XII*").

Trustee-Delegates thus cannot make the "substantial merit" showing with respect to this latest appeal that they ***must*** demonstrate in order to have any chance to obtain a stay. Moreover, consideration of the other factors (including the public interest) weighs ***strongly*** in favor of the denial of the request. Most glaringly, Trustee-Delegates fail even to address, let alone refute, the additional "irreparable harm"

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[3] In accordance with Circuit Rule 27(c), Plaintiffs-Appellees combine their motion to remand this matter to the District Court with their opposition to the Motion for Stay.

that Plaintiff-Beneficiaries will suffer if the wholly unwarranted stay is granted. For this reason alone, their request for relief should be flatly rejected.

II. BACKGROUND

Plaintiffs-Appellees are the beneficiaries of the Individual Indian Trust ("the Trust") which the United States Government has administered and managed for nearly 120 years. On June 10, 1996, Plaintiff-Beneficiaries filed an action in equity alleging Trustee-Delegates' breach of trust duty and requesting institutional reform and a complete accounting of all Trust funds and assets. *Cobell v. Norton,* Civil Action No. 96-1285 (RCL).[4] The litigation is now in its ninth year.

Over the past eight and one-half years, Trustee-Delegates have attempted repeatedly to limit the nature and scope of the accounting that the United States Government owes to Plaintiff-Beneficiaries. They have refused to account to the class as a whole, and they persist in attempting to re-litigate issues which this Court decided with finality four years ago.

A. The Structural Injunction Issued on September 25, 2003 to Enforce Trustee-Delegates' Fiduciary Duties

Notwithstanding the Court's clear delineation of the nature and scope of Trustee-Delegates' accounting duty in *Cobell VI*, the violation of this fundamental fiduciary obligation has continued. The District Court therefore scheduled further proceedings to determine whether additional injunctive relief was warranted and, if so, to determine the nature and scope of the relief required to implement and enforce this Court's judgment in *Cobell VI.* The District Court designated these further proceedings as "the Phase 1.5 Trial" and announced that the trial would "encompass additional remedies with respect to the fixing the system portion of this case and approving an approach to conducting an historical accounting of the IIM trust accounts." *Cobell v. Norton*, 226 F. Supp.2d 1, 162 (D.D.C. 2002) (hereinafter "*Cobell VIII.)*"

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[4] On February 4, 1997, the District Court certified "[t]he class of present and former beneficiaries of Individual Indian Money accounts (exclusive of those who prior to the filing of the Complaint herein had filed actions on their own behalf alleging claims included in the Complaint) (hereinafter "the Class"), numbering in excess of 300,000. . . ." *See* Order Certifying Class Action, dated February 4, 1997 at 1, ¶ 1. (Dkt #27).

Following the Phase 1.5 Trial, the District Court entered a structural injunction on September 25, 2003, to implement and enforce the fiduciary responsibilities of Trustee-Delegates that this Court had determined to exist three years earlier.

The structural injunction included "historical accounting" provisions similar to those contained in the District Court injunction issued on February 23, 2005, as well as "fixing the system" provisions directing Trustee-Delegates to file and implement a "To-Be" plan for the reform of Trust administration.

The District Court concurrently entered two separate opinions, consisting of more than 350 pages, setting forth extensive findings of fact and legal conclusions and explaining the "*profound necessity*" for the entry of such a structural injunction in this litigation. *Cobell v. Norton,* 283 F. Supp.2d 66, 72 (D.D.C. 2003) (hereinafter "*Cobell X*") (emphasis added).

B. The "Midnight Rider" Provision Enacted In An Effort To Temporarily Suspend Enforcement of Trustee-Delegates' Accounting Obligation

Trustee-Delegates thereafter appealed (No. 03-5314), and on November 10, 2003 an appropriations bill was signed into law containing a Rider provision purporting to relieve the Department of the Interior of any requirement to "commence or continue historical accounting activities with respect to . . . the Trust" until December 31, 2004.[5] Because the appropriations language quietly slipped into the Conference Report at the eleventh hour, it has been referred to as the "Midnight Rider" provision.

Trustee-Delegates moved for an across-the-board stay of the structural injunction on the same day the Midnight Rider was enacted. This Court issued an administrative stay on November 12, 2003 and a further order two and one-half months later staying the structural injunction until after Trustee-Delegates' appeal had been decided. In response to Plaintiffs-Appellees' motion for reconsideration on grounds that the further delay in implementing the District Court's injunctive relief was exacerbating Trust-Beneficiaries' irreparable injury, the Court acknowledged the "delay-related harm to the appellees," but

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[5] *Dept. of the Interior and Related Agencies Appropriations Act,* Pub. L. No. 108-108, 117 Stat. 1241, 1263 (Nov. 10, 2003). Alternatively, the Rider provided that it would expire sooner than December 31, 2004 in the event of an amendment of the 1994 Reform Act provision requiring that an accounting of "all funds" be made. As noted below, however, the December 31 expiration date has since come and gone without any such amendment.

nonetheless identified "other factors – including the effects of the November 2003 Appropriations Act on the appellants" – found to "outweigh it in this case." (*See* 4/21/04 Order in Case No. 03-5314)

The stay of the structural injunction thus remained in effect for nearly thirteen months until after *Cobell XIII* was decided.

On December 10, 2004 the Court vacated the "historical accounting" provisions of the September 25, 2003 structural injunction, holding that those provisions were "without legal basis" so long as the Midnight Rider's "moratorium" on accounting activities remained in effect. *Cobell XIII*, 392 F.3d at 468.). The Court found that the Rider gave Interior only "***temporary relief*** from any common law or statutory duty to engage in a historical accounting for the IIM accounts." *Id.* at 466 (emphasis added). The Court further observed that: "Absent Congressional action by that date, obviously [the Midnight Rider] will cease to bar the historical accounting provisions of the injunction." *Id.* The *Cobell XIII* Court expressly declined to address "the issues that would be relevant if the district court then reissued [the historical accounting] provisions.

Addressing the "fixing the system" provisions of the 2003 structural injunction separately and on the merits, the Court rejected Defendants-Appellants' contention that institutional trust reform was outside the scope of the case ("we are puzzled by the idea that the 'fixing' issues represent an expansion of the lawsuit"). *Id.* at 470. It also upheld what it termed the "core" reform provision of the structural injunction requiring that Interior complete and file "a detailed [To-Be] plan to fulfill its fiduciary obligations." *Id.* at 474.

While other "fixing the system" provisions (and the appointment of a monitor) were vacated, ***nothing*** decided in *Cobell XIII* reasonably suggests that the authority of the District Court to address continuing breaches of specific trust duties has been in any way limited. To be sure, the Court determined that "[h]owever broad the government's failures as trustee, which go back over many decades and many administrations," the District Court "cannot issue enforcement remedies – by any means – for trust breaches that it has not found to have occurred." *Id.* at 474. Nevertheless, the Court also declared that upon making "specific findings of unreasonable delay in Interior's performance of its fiduciary duties",

(*id.* at 475) the District Court possessed the authority "to order[] specific relief for those breaches." *Id.* at 477. And *Cobell XIII* reiterated and affirmed that "***[t]o the extent Interior's malfeasance is demonstrated to be prolonged and ongoing, more intrusive relief may be appropriate, as we held was the case in Cobell VI for the government's failure to provide a statutorily required accounting.***" *Id.* at 477-478. (emphasis added).

C. The *Cobell XII* Decision Further Ratifies the District Court's Remedial Authority

The outcome in a related interlocutory appeal decided just one week before *Cobell XII* further confirms the District Court's authority to remedy ongoing breaches of declared trust duties.

In *Cobell XII*, the Court vacated a March 15, 2004 order directing that Interior's computer systems housing or affording access to electronically stored Trust Data be disconnected from the Internet. The Court concluded that a further evidentiary hearing should have been conducted before the court decided whether IT systems that Interior officials had confessed three years earlier contained "significant deficiencies" remained so insecure as to warrant the imposition of such relief.

In so holding, the Court recognized and re-affirmed "the district court's authority to exercise its discretion, as a court of equity, in fashioning a remedy to right a century-old wrong or to enforce a consent decree." *Cobell XII*, 391 F.3d at 257. The Court also rejected (once again) Defendants-Appellants' argument that the District Court had exceeded its remedial authority, declaring that "the narrower judicial powers appropriate under the APA do not apply." *Cobell XII*, 391 F.3d at 257. And the *Cobell XII* Court reiterated what this Court declared four years earlier in announcing the broad scope of the Court's equitable authority:

> [T]he Secretary has an 'overriding duty . . . to deal fairly with Indians,' [*Cobell VI*, 240 F.3d] at 1099, and the Secretary's actions must be judged by 'the most exacting judiciary standards,' *id.* [citation omitted], in this litigation. ... ***The district court, then, retains substantial latitude, much more so than in the typical agency case, to fashion an equitable remedy because the underlying lawsuit is both an Indian case and a trust case in which the trustees have egregiously breached their fiduciary duties.***

Cobell XII, 391 F.3d at 257-258. (emphasis added).

D. Issuance of the "Historical Accounting" Injunction Following the December 31, 2004 Expiration of the Midnight Rider

Within weeks following the Court's decisions in *Cobell XII* and *Cobell XIII*, the Midnight Rider expired by its terms. With it, the temporary "bar" to enforcement of Trustee-Delegates' accounting obligations lifted. And, as the District Court observed in issuing the further equitable relief now before this Court, December 31, 2004 has now come and gone without any Congressional solution "available or in the offing." (Cobell, 2005 WL 419 293, at *2).

With another year and one-half lost due to an appeal that failed even to produce a decision on the merits with respect to the "historical accounting" provisions, the District Court understandably has chosen to reissue the historical accounting injunction in a further effort to enforce Trustee-Delegates' compliance with their fiduciary obligations. The injunction issued on February 23, 2005 is significantly ***reduced*** in scope in comparison with the 9/25/03 structural injunction. In accord with *Cobell XIII,* it contains no provisions intended to compel Trustee-Delegates' compliance with trust duties other than the accounting obligation declared in *Cobell V* and affirmed by this Court in *Cobell VI* four years ago. Nor does the February 23 injunction call for a monitor.

Nevertheless, Trustee-Delegates allege that the February 23 injunction constitutes an improper attempt on the part of the District Court to "take control over both the general substance and detailed particulars of the accounting." (Mot. at 18). Such an allegation is wholly unjustified, as even a cursory review of the February 23 injunction confirms:

- The District Court has chosen to issue a "performance-standard" injunction *Cobell X* at 213. Thus, it has been left to the defendants to determine ***how*** to accomplish the various accounting plans, tasks and deadlines ***unless*** what they propose is so legally and factually deficient as to exacerbate the already "unconscionable" delay and further deprive plaintiffs of their vested property rights.

- The February 23 injunction is based on Interior's 1/6/03 accounting plan rather than the alternative plan plaintiffs proposed and advocated during the 1.5 trial (plaintiffs' plan was premised on the ***impossibility*** of Trustee-Delegates ever doing an ***adequate*** accounting).
- The deadlines imposed under the February 23 injunction for accounting-related activity for the remainder of the 2005 calendar year are ***solely*** with respect to the submission of plans and the indexing and collection of records essential to the performance of Trustee-Delegates' fiduciary duties. And, the January 2006 completion date for verifying per capita and judgment account transactions is more generous than the completion dates stated in Interior's original 1/6/03 plan.
- The February 23 injunction additionally allows Trustee-Delegates to request and obtain extensions of accounting-related deadlines for "good cause" shown. *See* Cobell, 2005 WL 419293, at *7.
- Significantly, the February 23 injunction also requires that Trustee-Delegates notify the Court "immediately" of any information that might affect their ability to comply with the injunction's timetable for accomplishing the ***adequate*** accounting required by law. *Id.* Clearly the District Court has no interest in compelling Trustee-Delegates to proceed with the performance of the "historical accounting" requests set forth in the Court's order if defendants cannot possibly accomplish what is necessary to satisfy their fiduciary obligations.

Nevertheless, Trustee-Delegates have appealed the February 23 injunction and seek yet another stay (this time ***without*** a Rider provision supporting their request). For each of the reasons below, their Rule 8 request should be summarily denied.

ARGUMENT

I. THIS CASE SHOULD BE SENT BACK TO THE DISTRICT COURT.

As this Court well knows, the parties to this case agree on virtually nothing. Notably, however, there now appears to be agreement on the following: the District Court should not have entered the structural injunction if it is impossible for Trustee-Delegates to comply with it to perform an adequate historical accounting, and the court below did not consider the issue of impossibility when it re-entered

the injunction. Accordingly, the case should be remanded to the District Court for further proceedings with respect to this question.

It literally is hornbook law that "[a] court will not grant an injunction that would require the defendant to do something that is impossible." 42 AM. JUR. 2d *INJUNCTIONS* §21 (2004). As the Supreme Court explained in *Maggio v. Zeitz*, 333 U.S. 56, 64, 69 (1948), there is no "warrant [for] issuance of an order which creates a duty impossible of performance. . . . Every precaution should be taken that orders issued, in turnover as in other proceedings, only after legal grounds are shown and only when it appears that obedience is within the power of the party being coerced by the order."

It is equally well settled that a party cannot be held in contempt unless "there is actually a present ability to comply." *Maggio*, 333 U.S. at 77. *See also, e.g., United States v. Rylander*, 460 U.S. 752, 757 (1983) ("[w]here compliance is impossible, . . . [there is no basis] to proceed with the civil contempt action"). As this Court has explained, "[t]he sound discretion of an equity court does not embrace enforcement through contempt of a party's duty to comply with an order that calls him to do an impossibility." *SEC v. Ormont Drug & Chemical Co.*, 739 F.2d 654, 656 (D.C. Cir. 1984) (citation and internal quotation marks omitted). *See also, e.g., Tinsley v. Mitchell*, 804 F.2d 1254, 1256 (D.C. Cir. 1986) ("[i]t is well established that impossibility of performance constitutes a defense to a charge of contempt").

In this case, as Trustee-Delegates briefly summarize (Mot. at 6, 11), Plaintiff-Beneficiaries took the position at the time the structural injunction first was entered that it was impossible for the decree to be implemented to lead to an adequate historical accounting. *See* Plaintiffs' Plan for Determining Accurate Balances in the Individual Indian Trust, Dkt# 1714. (Attached as Exh. A.) Indeed, in our brief to this Court in *Cobell XIII* (at 44-45), we reiterated those concerns and demonstrated that they had been exacerbated by intervening developments. Furthermore, as Trustee-Delegates note (Mot. at 11), on remand from *Cobell XIII*, we renewed in the District Court our position that the structural injunction was impossible to implement to produce an adequate historical accounting.

Although Trustee-Delegates objected to the original structural injunction, they did not urge an impossibility argument to the District Court. However, in light of Trustee-Delegates' subsequent statement that compliance would cost many billions of dollars, our brief in *Cobell XIII* (at 45) observed to this Court their position was "tantamount to a concession that the injunction entered below is impossible to implement."

Trustee-Delegates' position is more candid in light of their present stay application. In their motion, Trustee-Delegates represent that compliance with the February 23 injunction could cost $12 billion or more (Mot. 2, 17) and further concedes that compliance may not be "feasible" at all (*id.* at 16). *See also* Mot. 7 ("sampling [is] crucial to the viability" of a feasible plan). More specifically, the Cason Declaration submitted in support of the present stay request expressly represents that compliance would be "impracticable, ***if not impossible***" and would cost "$12-13 billion, and ***maybe significantly more***." Cason Decl. at 1. Recent testimony of Interior officials to the Senate Committee on Indian Affairs is to the same effect. *See, e.g., Oversight hearing Before the Senate Committee on Indian Affairs on Indian Trust Reform,* 109th Cong. at 16 and n. 2 (Mar. 9, 2005) (written testimony of Jim Cason, Acting Assistant Secretary for Indian Affairs, U.S. Dept. of Interior) (estimated cost could be $12 billion and "may possibly be significantly more"). (Attached as Exh. B).

Thus, the parties now seem to be in agreement that the question of impossibility has a direct and substantial bearing on the propriety and enforcement of the structural injunction. Moreover, the parties also are in agreement that the District Court did not consider that issue in re-entering the injunction on February 23. *See* Mot. 17.[6]

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[6] Trustee-Delegates are wrong, however, in suggesting (Mot. 17) that the District Court may have considered the cost estimates at the time of the initial structural injunction. These estimates were developed subsequent to (indeed, in response to) the District Court's entry of the injunction. Trustee-Delegates immediately sought a stay in this Court and obtained an administrative stay on November 12, 2003. While Trustee-Delegates had taken the precautionary step of concurrently filing for a stay with the District Court, they then argued that the District Court had no jurisdiction to pass upon the stay in light of the notice of appeal to this Court and the Court's prompt issuance of the administrative stay. *See* Defendants' Opposition on Stay Request (filed Nov. 26, 2003), at 2. Thus, at no time was the District Court have an opportunity to consider the stated $12 billion or more in compliance costs. In light of

In these circumstances, the appropriate course, we submit, is for this Court to remand the case to the District Court for further proceedings. *See, e.g., Ormont,* 739 F.2d at 657 (remanding contempt order for proceedings on impossibility and "express[ing] no opinion" on the merits); *see also* D.C. CIR. HANDBOOK OF PRACTICE AND INTERNAL PROCEDURES (2002), § VIII-E ("[p]arties may file a motion to remand . . . the case . . . to have the district court . . . reconsider a matter, to adduce additional evidence, . . . [or] to clarify a ruling"). If the case is remanded and the district court accepts the impossibility argument, there would be no need for this Court to rule upon the validity of the re-entered structural injunction. In addition, if the case is remanded, there would be no occasion for this Court to grant any stay pending appeal.

A remand is particularly appropriate in light of Trustee-Delegates' representation that the accounting required under the terms of the February 23 injunction would cost upwards of $12 billion to complete but produce "no benefit to class members." **(Mot. at 319)**. Such exorbitant cost figures, if accurate, inform that Trustee-Delegates have been derelict in their duty to account to the Plaintiff-Beneficiaries for so long that the United States Government is either incapable or unwilling to perform the complete accounting required by law. This additional information should be presented to the District Court in deciding what other equitable relief may be appropriately fashioned "to cure the appellants' legal transgressions." *Cobell VI,* 240 F.3d at 1108. Indeed, this is precisely what the February 23 injunction itself requires in directing Trustee-Delegates to report "immediately" ***any*** information calling into question their ability to comply with the timetables and other obligations of the District Court's order. *Cobell,* 2005 WL 419293, at *7.

In the event of a remand, we do not believe it would be necessary to vacate the structural injunction pending further proceedings. Vacation would leave Trustee-Delegates under *no* obligation to do *anything* to move forward toward an adequate historical accounting. Moreover, in view of the foregoing discussion and the basis for the remand by this Court, Trustee-Delegates are not in jeopardy of

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Cobell XII, it is appropriate for the District Court on remand to hold an evidentiary hearing and evaluate the cost representation of Trustee-Delegates.

contempt for issues related to this injunction while the issue of impossibility is resolved. If, however, the Court concludes that vacation of the injunction must accompany a remand, Plaintiff-Beneficiaries nonetheless submit that remanding the case to the District Court remains the appropriate course.

II. THE STAY REQUEST IS PREMATURE.

If the case is not remanded, the stay request still should be denied because Trustee-Delegates fail to demonstrate that their alleged injury is immediate and irreparable. Accordingly, their request for a stay is premature.

The vast majority of the injunctive provisions of which Trustee-Delegates complain require, as the initial step, only that they prepare and submit a plan. *See, e.g.*, Sections III.B-III.C of the 2/23/05 injunction (requiring "detailed plans" to be filed with respect to the compilation of third-party trust records and other indexing/collection activities); ***and*** Sections III.N-III.P of the same (requiring plans to be submitted for system testing, quality control and other accounting-related processes).

Trustee-Delegates cannot claim – and, indeed, do not even try to claim – that the submission of a plan constitutes immediate and irreparable injury. *See, e.g., Cobell XIII*, 392 F.3d at 474 (upholding requirement that Interior devise and submit a To-Be Plan). That Trustee-Delegates, at some point down the road, may have to expend significant resources to remedy their longstanding and pervasive breaches of trust is not a basis for a stay at this time.

To be sure, Trustee-Delegates assert that it will be costly to begin to comply with the structural injunction. But they nowhere specify or quantify the purported burdens that would justify a stay at present. Their *ipse dixit* paying lip service to this requirement for a stay is insufficient on its face.

Although Trustee-Delegates do not focus on them (for good reason, as we address below), there are a few provisions of the structural injunction that do require Trustee-Delegates to take action now rather than in the future. For example, Section III-B directs that Trustee-Delegates "shall retrieve and retain all information concerning the Trust that is necessary to render an accurate accounting." *Cobell*, 2005 WL 419293, at *3. Thus, the injunction contemplates that, in addition to submitting an appropriate plan within 60 days, Trustee-Delegates soon thereafter will issue subpoenas to entities outside the federal

government. While this required activity may be more imminent, it is hardly of sufficient burden to establish irreparable injury. Moreover, as discussed below, it is precisely this activity where the irreparable injury to Plaintiff-Beneficiaries – and indeed the fundamental threat to an adequate historical accounting – is the greatest, and therefore the justification for a stay the weakest, particularly given the record of spoliation in these proceedings.

In prematurely seeking this Court's intervention and relief, Trustee-Delegates also ignore Sections IV.B.3 and IV.B.4 of the February 23, 2005 injunction. *See id.* at *7. These provisions allow for potentially affected deadlines -- *i.e.*, those compliance dates that may arise while this matter is on appeal -- to be amended by the District Court upon a showing of "good cause" while keeping intact other deadlines regarding accounting activities that should in no way be affected.

This Court's authority to stay a District Court order is derived from the All Writs Act. 28 U.S.C. § 1651. Hence, it is available *only* where there is *no* other available means of relief. *See In re Cheney*, 334 F. 3d 1096 (D.C. Cir. 2003). Thus, Trustee-Delegates' failure to invoke this other remedy pursuant to the structural injunction *further* precludes Trustee-Delegates' requested relief. Plainly, there is another, far less draconian means to afford any relief tailored to the situation presented upon a showing of "good cause." There is no reason to enter an across-the-board stay that would "call to a halt" any and all steps regarding the historical accounting, further exacerbating already found "unconscionable" delay and irreparable harm. *Cobell VI*, 240 F.3d at 1096.

In sum, the injunction does not, at this point, involve the sort of immediate and irreparable onus that would even come close to warranting the requested stay.

III. APPELLANTS FAIL TO SATISFY THE REQUIREMENTS FOR A STAY.

In any event, Trustee-Delegates fall far short of meeting the requirements for the issuance of a stay. A motion to stay a District Court order pending appeal *must* state the reasons for granting the stay *and also* "discuss, with specificity, each of the following factors: (i) the likelihood that the moving party will prevail on the merits; (ii) the prospect of irreparable injury to the moving party if relief is withheld; (iii) the possibility of harm to other parties if relief is granted; and (iv) the public interest." Circuit Rule

8(a)(1). "[I]t is the movant's obligation to justify the court's exercise of such an extraordinary remedy." *Cuomo v. U.S. Nuclear Reg. Comm.*, 772 F.2d 972, 978 (D.C. Cir. 1985).

As demonstrated below, Trustee-Delegates fail to satisfy any of these requirements.

A. Factor One -- There Is No Likelihood That Trustee-Delegates Will Prevail On The Merits.

Even if the equities and the public interest strongly favored issuance of the stay (which they do not), Trustee-Delegates would be required to demonstrate at minimum that their latest interlocutory appeal has "substantial case on the merits." *Cuomo v. U.S. Nuclear Reg. Comm.*, 772 F. 2d at 974 (citation omitted). That they cannot do.

Plaintiffs-Appellees have prevailed on the merits of each phase of this litigation, including the Phase I trial and the Phase 1.5 trial concluded in July 2003.[7] Thus, there is no basis for concluding that Trustee-Delegates will prevail on the merits of this further appeal when the injunction they seek to challenge has been carefully crafted to provide further relief in accordance with trust obligations this Court considered and affirmed in *Cobell VI*.

Indeed, many of the same legal arguments which this Court addressed and rejected in *Cobell VI* have been raised yet again in Trustee-Delegates' Motion for Stay. Without acknowledging what they are doing, Trustee-Delegates once again seek to re-litigate matters decided with finality four years ago.

1. Trustee-Delegates' Renewed Assault On This Court's February 23, 2001 Judgment.

The following are examples of legal arguments that Trustee-Delegates have resurrected in their Motion for Stay – notwithstanding the fact that this Court disposed of these same contentions in *Cobell VI* in affirming the District Court's prior issuance of relief.

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[7] *See Cobell v. Babbitt*, 91 F. Supp.2d 1 (D.D.C. 1999), *aff'd sub nom, Cobell v. Norton*, 240 F.3d 1081 (D.C. Cir. 2001) (Trial I).; *Cobell v. Norton,* 283 F.Supp.2d, 66 (D.D.C. 2003) (Trial 1.5)

Claims of Lack of Funding

Trustee-Delegates repeatedly assert the February 23 injunction should be stayed due to cost concerns. (Mot. at 1-4, 8-9, 13-16 and 18-20). This Court squarely addressed this issue of cost in *Cobell VI* and held that:

> **[N]either a lack of sufficient funds** nor administrative complexity, in and of themselves, **justify extensive delay**, nor can the government claim that it has become subject to unreasonable expectations. Federal officials were aware of their fiduciary obligations long before the passage of the 1994 Act-let alone the initiation of this action-and yet little progress has been made in discharging those duties.

Cobell VI, 240 F.3d at 1097 (emphasis added).

Clearly, the alleged cost and administrative burden associated with Trustee-Delegates' discharge of fiduciary duties that the Court declared the United States government owes, and has owed, to 500,000 individual Indian trust beneficiaries does ***not*** justify the Court's involvement to shield Trustee-Delegates from accountability for the refusal to discharge these legal obligations. Moreover, as the United States Supreme Court has recently confirmed, purported cost concerns do ***not*** excuse the government's non-performance of its binding obligations. *Cherokee Nation of Oklahoma v. Leavitt*, ___ U.S., ___ , 125 S. Ct. 1172 (March 1, 2005).[8]

Undue Delay Constitutes Irreparable Harm

Trustee-Delegates urge the Court to stay the enforcement of their fiduciary obligations without even acknowledging the dire effect of their continuing "unconscionable" delay on Plaintiff-Beneficiaries. (Mot. at 16-20). Four years ago, this Court examined the evidence in this Trust litigation and held that:

> [A]ppellants have unreasonably delayed the discharge of their fiduciary obligations to IIM beneficiaries, and that there is little reason to believe that, absent court intervention, these duties will be discharged any time soon.

Cobell VI, 240 F.3d at 1105. The Court further determined that the resulting harm to the Plaintiff-Beneficiaries was severe and irreparable:

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[8] This rule applies with even greater force here when the obligation is of a fiduciary nature, not merely a contractual one. *See e.g., Seminole Nation v. United States*, . 316 U.S. 286, 297, n.12 (1942) (the Supreme Court recognizes that in regard to Indian trust 'the government is something more than a contracting party' and therefore 'its conduct . . . should therefore be judged by the most exacting fiduciary standards." (footnotes and citations omitted)).

> The district court noted that **the consequences of further agency delay are potentially quite severe**. Documents necessary for a proper accounting and reconciliation have been lost or destroyed, and the district court found little reason to believe that this would change in the near future. . . . **Given that many plaintiffs rely upon their IIM trust accounts for their financial well-being, the injury from delay could cause irreparable harm to plaintiffs' interests as IIM trust beneficiaries. Thus it seems that "the interests at stake are not merely economic interests in [an administrative scheme], but personal interests in life and health.**" *Public Citizen Health Research Group v. Auchter*, 702 F.2d 1150, 1156 (D.C.Cir.1983) (citation omitted).

Id. at 1097 (emphasis added).

Nowhere do Trustee-Delegates even address this critical issue in their 20-page Motion for Stay. Rather than acknowledge the very real harm their incessant delay has and continues to inflict upon "personal interests in life and health," they choose to ignore it. Given the fiduciary obligations they owe to Plaintiff-Beneficiaries, the omission is telling.

The Nature and Scope of the Accounting

Trustee-Delegates argue that the District Court erred in defining the nature and scope of their accounting duty (Mot. at 14-16). This same argument was made four years ago when Trustee-Delegates unsuccessfully challenged the District Court's accountability determinations and the relief issued following the Phase I trial. This Court rejected Trustee-Delegates' argument then (as it should now):

> **Appellants maintain that even if an accounting is required, the district court overstepped its bounds by defining the nature of the accounting required.**

Cobell VI, 240 F.3d at 1103 (emphasis added). The Court went on to declare that:

> Appellants never explain how one can give a ***fair*** and ***accurate*** accounting of ***all*** accounts without first reconciling the accounts, taking into account **past deposits, withdrawals, and accruals**. Indeed, the government's own expert acknowledged that one could not determine an accurate account balance without confirming **historical account balances.**

Id. at 1102 (emphasis in original; bold emphasis added).

The Duty To Account For "All" Funds Held In Trust

In seeking to stay the structural injunction, Trustee-Delegates also renew the argument that not all Trust funds and assets must be accounted for (Mot. at 14-20).

This Court held four years ago that:

> [T]he Interior Secretary owes IIM trust beneficiaries an accounting for '*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.' 24 U.S.C. § 4011(a) (emphasis added). 'All funds' means *all funds*, irrespective of when they were deposited. . . .

Cobell VI, 240 F.3d at 1102. (emphasis in original) The Court went on to determine that this obligation is inherent "in the trust relationship itself" and that "[i]t is black letter trust law that '[a]n accounting necessarily requires ***a full disclosure and description*** of ***each item*** of property . . . .'" *Id.* at 1103 (emphasis added).

The Duty to Collect and Protect Trust Data

In moving to stay the structural injunction, Trustee-Delegates also allege that the February 23 injunction has erroneously imposed record-collection, indexing and other obligations (Mot. at 17-18).

This Court held in *Cobell VI* that Trustee-Delegates' failure to protect IIM Trust Data constituted a clear breach of trust. In particular, it affirmed the District Court's finding that the Interior Secretary and other responsible officials were in breach of trust for failing to "retain all information" necessary for an accurate accounting of the Trust. *Id.* at 1105-07. This Court held that:

> The government's broad duty to provide a complete historical accounting to IIM beneficiaries necessarily imposes substantial subsidiary duties on those government officials with responsibilities for ensuring that an accounting can and will take place. *In particular, it imposes obligations on those who administer the IIM trust lands and funds to, among other things, maintain and complete existing records, recover missing records where possible, and develop plans and procedures sufficient to ensure that all aspects of the accounting process are carried out.*

Id. at 1105 (emphasis added). The Court also recognized that "the management of a trust and rendering of an adequate accounting requires the locating and retention of records, operational computer systems and adequate staffing . . . . Anything less would produce an inadequate accounting." *Id.* at 1103.

As noted above, this same trust duty recently has been recognized and reaffirmed in *Cobell XII* (as authorizing the issuance of relief to protect irreplaceable Trust Data stored in Interior's grossly insecure IT systems).

The Level Of Oversight The District Court Would Be Required To Undertake To Assure That Trustee-Delegates Finally Discharged Their Obligations To The IIM Trust Beneficiaries

Trustee-Delegates allege that the District Court has overstepped its authority in taking further enforcement action which this Court determined to exist in *Cobell VI* (Mot. at 16-17). On this critical issue, this Court declared four years ago that:

> The level of oversight proposed by the district court may well be in excess of that countenanced in the typical delay case, but so too is the magnitude of government malfeasance and the potential prejudice to the plaintiffs' class. Given the history of destruction of documents and loss of information necessary to conduct an historical accounting, the failure of the government to act could place anything approaching an adequate accounting beyond plaintiffs' reach.

Cobell VI, 240 F.3d at 1109. This Court also made a point of emphasizing that: "The [district] court should not abdicate its responsibility to ensure that its instructions are followed. This would seem particularly appropriate where, as here, there is a record of agency recalcitrance and resistance to the fulfillment of its legal duties." *Id. See also Cobell XII*, 391 F.3d at 257-258.

The District Court's Authority To Issue Injunctive Relief To Enforce Trustee-Delegates' Fiduciary Responsibilities

In moving to stay the February 23 injunction, Trustee-Delegates also renew their challenge of the District Court's authority to impose such equitable relief. (Mot. at 10-16).

As this Court recognized in *Cobell VI*, however, the District Court has "substantial authority to order that relief which is necessary to cure the appellant's legal transgressions." 240 F.3d at 1108. "'Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.'" *Id.* (quoting *Swann v. Charlotte-Mecklenberg Bd. of Ed.*, 402 U.S. 1, 15 (1971)).

This same authority also has been re-affirmed in *Cobell XII*: "The district court, thus, retains substantial latitude, much more so than in the typical agency case, to fashion an equitable remedy." 391 F.3d at 257.

2. Defendants-Appellants' Failed Attempt to Assert *Cobell XIII* As A Limitation On the District Court's Remedial Authority.

In addition to their reliance on legal arguments this Court has rejected time after time, Trustee-Delegates assert that the District Court has impermissibly failed to consider this Court's guidance in *Cobell XIII*. (Mot. at 14-15). They also assert that the court inappropriately "dictate[d] the means and methodologies used for the accounting." *Id.* Both arguments are untenable: They ignore settled law and the express holdings of this Court in *Cobell VI, Cobell XII* and *Cobell XIII*.

Plaintiffs do not quarrel with Trustee-Delegates' assertion that to enforce duties, the District Court must identify a statutory basis for those duties; that basis, of course, can be expressed in the statute or ***implicitly created***.[9] Once a duty is established, however, *Cobell XIII* has reaffirmed that the duty is to be "understood in light of the common law of trusts." Where "Interior [has] breached particular statutory trust duties," moreover, the District Court has ample authority "to order[] specific relief for those breaches." *Cobell XIII* 392 F.3d at 477.

In regard to the duty to account, the court has already acted in conformity with these directives. Thus, contrary to what Trustee-Delegates argue, the court was under ***no*** obligation to "revisit the legal basis" for the accounting injunction. Indeed, it is plain that both the duty to account and breach of that duty were established by *Cobell VI*. There, this Court held it "*beyond dispute* . . . that the government has *longstanding* and substantial trust obligations to Indians, particularly to IIM trust beneficiaries, *not the least of which is a duty to account*," *Cobell VI*, 240 F.3d at 1098 (emphasis added),[10] and that there was "ample evidence in the record to support the district court's ... conclusion that appellants' failure to take reasonable steps toward the discharge of their trust obligations [to account] constituted a breach of their

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[9] *Cobell VI* made clear that "many of the [trust] duties . . . are implied" by the establishment of the trust relationship. *Id.* at 1099, and that in the obligation to provide an accounting "inheres in the trust relationship itself." *See also id.* (emphasis added). Importantly, even where a statute fails "to enumerate the trustee's duties," the government "is not absolve[d] . . . of its responsibilities." *Cobell VI* at 1098-99 (citations omitted).

[10] *See also Cobell VI*, 240 F.3d at 1048 ("[T]he government is incorrect to the extent that it assumes that the 1994 Act forms the basis for its fiduciary obligations. The 1994 Act did not create these obligations any more than it created the IIM trust accounts."); *id.* at 1103. ("Not only does the 1994 Act plainly reaffirm the government's preexisting duty to provide an accounting to IIM trust beneficiaries, but it is plain that such an obligation inheres in the trust relationship itself.").

fiduciary duties." *Id.* at 1098.[11]

Since the statutorily-grounded duty to account was found applicable to the Individual Indian Trust and defendants breached that duty, the Court had "broad equitable powers in ordering specific relief." *Cobell VI,* 240 F.3d at 1108. *See also Cobell XIII,* 392 F.3d at 477. These powers are not limited, as Trustee-Delegates suggest, to merely accepting whatever misguided, inadequate and self-serving "accounting" plan they design – where, as here, the record evidence shows such plan will further unconscionably delay the rendering of the accounting. Rather, the District Court has the "full range of remedial powers" and "substantial ability to order ***that relief*** *which is necessary to cure the appellants' legal transgressions.*[12] *Cobell VI,* 240 F.3d at 1108 (emphasis added). The broad scope of the District Court's equitable powers in this trust case to cure breaches found was further confirmed in *Cobell XII*:

> The district court . . . *retains substantial latitude*, much more so than in the typical agency case, to fashion an equitable remedy because the underlying lawsuit is both an Indian case and a trust case in which the trustees have egregiously breached their fiduciary duties. *Id.* at 1099, 1109. The Secretary's suggestion that the appropriate role for the district court was confined to retaining jurisdiction and ordering periodic progress reports, as in *In re United Mine Workers of America International Union*, 190 F.3d 545, 556 (D.C. Cir. 1999), ignores these salient considerations.

391 F. 3d 257-258.

In short, the District Court was well within its discretion to determine that the relief granted was precisely the remedy necessary after a century of delay to "cure the appellants' legal transgressions."[13]

3. Trustee-Delegates' Argument That The District Court Unlawfully Dictated The "Means and Methodologies Used" For The Accounting.

This contention, too, is unavailing. The District Court carefully reviewed their accounting plan and measured it by the standards required by trust law, as this court directed it to do in *Cobell VI.* The

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[11] This nature and scope of the duty is defined in "traditional equitable terms." *Id.* at 1099. Further, the Court stressed that the government was wrong that the 1994 Act created the duty to account, rather the Act merely "reaffirm[ed] the government's *preexisting* fiduciary duty to perform a complete historical accounting," *id.* at 1102 (emphasis added), and it did not "limit or alter this right." *Id.* at 1104.

[12] *See also id.* ("'[I]f a right of action exists to enforce a federal right and Congress is silent on the question of remedies, a federal court may order any appropriate relief.'" (quoting *Franklin v. Gwinnett County Public Schools,* 503 U.S. 60, 69 (1992)).

[13] *See also Cobell XIII* at 478 ("Interior's malfeasance is demonstrated to be prolonged and ongoing, more intrusive relief may be appropriate.").

District Court found numerous deficiencies that required the injunctive relief granted to prevent further delay in the already "unconscionably" delayed fulfillment of this basic obligation.

Trustee-Delegates' argument steers off course in two respects. First, they believe that the District Court must wait for them to fully implement their "accounting plan" – a plan that plainly does not discharge their duties as defined in "traditional equitable terms." *Id.* at 1099. There is no support for this proposition, particularly where there is a breach found as here and the injunctive relief is narrowly tailored to "cure the appellants' legal transgressions."

Second, the government suggests numerous ways in which the 1994 Act limited and altered the preexisting duty to account[14] and complains that the District Court ignored these limitations. But, of course, *Cobell VI* has already rejected this precise argument, holding that the 1994 merely "reaffirm[ed] the government's *preexisting* fiduciary duty to perform a complete historical accounting," *id.* at 1102, and it did not "*limit or alter this right.*" *Id.* at 1103 (emphasis added). Trustee-Delegates fail to explain how they can look to the 1994 Act as limiting the duty to account without wholly ignoring *Cobell VI*'s clear rejection of their proposition.

Moreover, Trustee-Delegates' contention that the District Court "erred" in ordering an accounting of all Trust assets is utterly without merit. In fact, the District Court *accepted* Interior's general methodology, and Interior's plans and suggested completion dates for a number of the accounting projects incorporated in the structural injunction. Thus, Trustee-Delegates' only possible complaint is that the Court somehow erred by rejecting Trustee-Delegates' arbitrary limitations on the nature and scope of the historical accounting to be rendered.

As the District Court correctly determined, however, Trustee-Delegates' limitations on the nature and scope of the accounting were contrary to law and *Cobell VI.* This Court held four years ago that governing law required "a complete historical accounting of trust fund assets," and that such an accounting must necessarily include all "past deposits, withdrawals, and accruals." *Cobell VI,* 240 F.3d at 1102.

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[14] *See, e.g.*, Appellants' Motion at 15 (discussing the supposed 1938 restriction).

The District Court also meticulously addressed the various exclusions from the accounting claimed by Interior and found them to be in conflict with *Cobell VI*. For example, Trustee-Delegates have refused to account for any accounts closed prior to enactment of the 1994 Act based on the notion that the 1994 Act was the sole basis of their accounting duty. But that proposition had been resoundedly rejected in *Cobell VI*, 240 F.3d at 1100 ("The fundamental problem with appellants' claims is the premise that their duties are solely defined by the 1994 Act. The Indian Trust Fund Management Reform Act reaffirmed and clarified preexisting duties; it did not create them.").

The District Court also properly rejected Trustee-Delegates' proposed use of "statistical sampling" after determining -- based on the evidence presented during the 44-day Phase 1.5 trial -- that

> absolutely no evidence has been presented to the Court that statistical sampling methods have ever been employed in the performance of an accounting, as opposed to an audit, much less that such methods are accepted by professional accountants as part of an accounting. . . . The second reason is that the D.C. Circuit has made clear that '[c]laiming the role of administrator . . . does not absolve the government of its enforceable obligations to the IIM trust beneficiaries' and that 'appellants may not escape from their fiduciary obligations by appealing to their roles as administrators of a federal program.' (citation omitted)

Cobell X, 283 F. Supp.2d at 193.

In sum, the injunction the District Court issued on February 23, 2005 reflects the District Judge's careful consideration and application of this Court's prior holdings in making findings based on the voluminous evidence of record in the Phase 1.5 trial proceedings. As a result, Trustee-Delegates' appeal of the Order is insufficient to justify any further delay of enforcement.

B. Factor Two – There Is No Prospect Of Irreparable Harm To Trustee-Delegates If Relief Is Withheld.

While Trustee-Delegates allege that the total cost of complying with the February 23 injunction could exceed $12-13 billion, they are conspicuously silent with respect to the anticipated cost of complying with those provisions of the structural injunction that will come due while this appeal is pending. *See* Cason Decl. at 1. Moreover, and as noted above, near-term deadlines entail making reports And Trustee-Delegates claim already to be working on a number of the accounting activities addressed in the February 23 injunction. *See* Cason Decl. at 12. Indeed, the upcoming deadlines include dates for the

submission of plans which Trustee-Delegates claim to have been preparing, and for accounting activities for which FY 2005 funding has been appropriated. *Id.*

Trustee-Delegates therefore fail completely to make the showing they must make in order to qualify for such extraordinary relief. Whatever work may remain to be done to submit plans due on April 24, 2005 and later on this year, this clearly does not constitute "irreparable harm" so as to authorize this Court's intervention. "The key word in this consideration is *irreparable*. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough." *Wisconsin Gas Co. v. Fed. Energy Reg. Comm.*, 758 F.2d 669, 674 (D.C. Cir. 1985) (emphasis in original). For this reason too, Trustee-Delegates' motion should be denied.

C. Factor Three – Plaintiffs-Appellees Will Suffer Additional Irreparable Harm If Relief Is Granted.

As this Court recognized four years ago in examining a case record replete with evidence of Trustee-Delegates' "malfeasance and recalcitrance" in the performance of their IIM Trust duties: "Given that many plaintiffs rely upon their IIM trust accounts for their financial well-being, the injury from delay would cause irreparable harm to plaintiffs' interests as IIM trust beneficiaries. Thus, "the interests at stake are not merely economic interests [in an administrative scheme], but personal interests in life and health.'" *Cobell VI,* 240 F.3d at 1097 (citation omitted). It was to redress this ongoing delay that the District Court issued the structural injunction, recognizing that the delay in providing "the long-promised accounting of their trust fund is simply beyond the pale." *Cobell X*, 283 F. Supp.2d at 212.

Staying the injunction in its entirety for the next six months to a year will only exacerbate the already "unconscionable" delay and result in additional irreparable harm to Plaintiff-Appellees. Moreover, the further irreparable harm will be felt *immediately* if the Court enters the across-the-board stay Trustee-Delegates unjustifiably are seeking. The injunction requires Trustee-Delegates to submit a plan on April 24, 2005, identifying locations where third-party records can be obtained to help "fill gaps" that Interior's own witnesses admit do exist. In directing Trustee-Delegates to make their upcoming submission, the District Court recognized that:

> the failure to take such steps risks inflicting irreparable harm upon plaintiffs, in that it subjects third-party trust records -- which might well constitute the sole extant documentation that could fill gaps in the record maintained by the government -- to an unreasonable risk of destruction or deterioration.

Cobell X, 283 F. Supp.2d at 160. The District Court also noted that Trustee-Delegates had been claiming to address this issue for years, and that the necessity of taking steps proactively to protect such records prior to their loss or destruction was fully consistent with the trust duties delineated by this Court in *Cobell VI*.

Trustee-Delegates should not now be given a "free pass" to call a halt to this essential activity based on their contention that compliance with other provisions of the injunction could be costly. Particularly where "irreparable harm" to the Trustee-Delegates will otherwise result, further undue delay should not be allowed.

D. Factor Four – The Requested Stay Would Contravene The Public Interest.

Here too, Trustee-Delegates gloss over this significant factor. Their reticence speaks volumes. Staying the structural injunction entered to rectify long-standing breaches of Trustee-Delegates' fiduciary responsibilities is inimical to the public interest. Government officials are not above the law, and this Court should not sanction further "unconscionable" delay and callous disregard for Plaintiff-Appellees while Trustee-Delegates seek to further postpone any meaningful accountability.

The Trustee-Delegates imply that it is the Courts -- both this Court and the District Court – that have imposed an expensive and difficult accounting obligation on the Trustee-Delegates. That is *not* true. The accounting obligation was conferred when "the Government assume[d] . . . elaborate control over forests and property belonging to Indians." *Cobell VI,* 240 F.3d at 1086. (*Citing United States v. Mitchell*, 463 U.S. 206, 225 (1983)).

The Courts were asked to construe what that trust obligation entailed. They did so. The District Court in its December 21, 1999 decision and this Court in *Cobell VI* on February 23, 2001 construed a governing law and declared the nature and scope of that trust duty.

Trustee-Delegates claim, but have not demonstrated, that it will cost vast sums to perform the ***adequate*** accounting required by law. The obscene costs represented by Trustee-Delegates confirm their inability to render the legally required accounting because of their historic and continuing malfeasance and spoliation of trust records.

That problem was not created by, nor the fault of, the Plaintiffs-Appellees but rather was solely the fault of the Trustee-Delegates whose malfeasance, neglect, and worse over the last hundred years left the Trust and supporting documentation in such a shambles that when called upon to render the accounting they must render but claim that it will cost billions of dollars -- which means it cannot be done. Trustee-Delegates cannot render the accounting which is central to their trusteeship. The Court can use its equitable powers to fashion a system to determine how the balances can be restated and corrected without attempting the historical accounting which the Trustee cannot do and which its cost estimate declares it cannot be done.

CONCLUSION

For all of the foregoing reasons, Plaintiffs-Appellees respectfully request that Defendants-Appellants' Emergency Motion for a Stay Pending Appeal be denied. Consistent with the expressed desire of the District Court and the parties to expedite this matter, Plaintiffs-Appellees also move to remand this case to the District Court regarding the question of impossibility without further delay.

Dated: March 17, 2005

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Combined Response to Appellants' Emergency Motion for Stay and Expedition and Plaintiffs-Appellees' Motion to Remand* was served on the following via electronic mail and hand delivery as stated below per this Court's order of March 10, 2005 and agreement of counsel:

VIA ELECTRONIC MAIL ON 3/17/05 & HAND DELIVERY ON 3/18/05
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Thomas M. Bondy, Esq.
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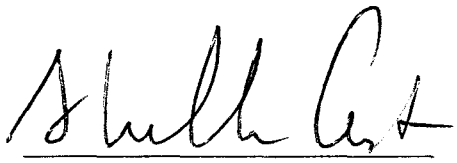

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ADDENDUM

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

No. 05-5068

ELOUISE PEPION COBELL, et al.,
Plaintiffs-Appellees,

v.

GALE A. NORTON, SECRETARY OF THE INTERIOR, et al.,
Defendants-Appellants.

PLAINTIFFS-APPELLEES' CERTIFICATE AS TO PARTIES AND AMICI

Pursuant to Circuit Rules 8(a)(4) and 28(a)(1)(A), undersigned counsel certifies as follows:

On February 4, 1997, the District Court certified the plaintiff class consisting of all past and present Individual Indian Trust beneficiaries. Individual Indian Trust beneficiaries are Indians on whose behalf, as trust beneficiaries, trust accounts are, have been, should be, or should have been established and maintained by the United States government to hold revenues generated by the Individual Indian Trust (the "Trust").[15] The Trust was established in 1887, and its *corpus* has consisted of as much as 54,000,000 acres of land,[16] carved out of reservations, legal title to which had previously been owned by Indian tribes.[17]

The named Plaintiffs-Appellees in this action are Elouise Pepion Cobell, Penny Cleghorn,[18] Thomas Maulson, Earl Oldperson[19] and James Louis LaRose. Trustee-Delegates are

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[15] The term "Individual Indian Trust beneficiary" includes all original allottees, and their heirs and individual Indian successors-in-interest, including executors and personal representatives.

[16] Presently, the United States government contends that there are approximately 11,000,000 acres of such lands remaining in the Trust under the control of the Trustee-Delegates. Revenues generated from the Trust lands have been and continue to be derived from many sources, including oil and gas, coal, timber, ranching, farming, easements and other rights of way, and the sale of such Trust lands.

[17] Pursuant to the General Allotment Act, enacted in 1887, each enrolled member of a tribe whose reservation was subject to such Act, was allotted from reservation lands certain parcels, typically in 80 or 160 acre allotments.

[18] Penny Cleghorn is the successor-in-interest to Mildred Cleghorn, one of the original named plaintiffs who passed away during the pendency of this litigation.

government officials, being Gale A. Norton, Secretary of the Interior, the Assistant Secretary of the Interior for Indian Affairs[20], and John W. Snow, Secretary of the Treasury. Trustee-Delegates have been named in this litigation in their "official capacities," as Trustee-Delegates responsible for administering the Trust on behalf of the Individual Indian Trust beneficiaries.

Dated: March 17, 2005

Respectfully submitted,

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[19] On March 5 2003, the District Court, (1) removed Earl Oldperson as a named class representative plaintiff, (2) permitted Mr. Oldperson to remain as an individual plaintiff, and (3) permitted class counsel to withdraw from the representation of Mr. Oldperson in all capacities other than as class counsel for a member of the certified class.

[20] Mr. Jim Cason was named as Acting Assistant Secretary following the resignation of Dave Anderson as Assistant Secretary of the Interior for Indian Affairs effective February 12, 2005.