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October 5, 2004

Mr. Mark J. Langer
Clerk, United States Court of Appeals
for the District of Columbia Circuit
United States Courthouse
Room 5423
Third & Constitution Avenue, N.W.
Washington, D.C. 20001

Re: Cobell v. Norton, No. 03-5314

Dear Mr. Langer:

By letter dated September 28, 2004, plaintiffs advised the Court of a September 9 district court ruling declaring that "Interior has once again proven that it can not be trusted and is in need of judicial oversight." Mem. 11. Plaintiffs argue that the ruling demonstrates the propriety of a structural injunction.

To the extent that the ruling is relevant, it underscores the extent to which the court has departed from principles of judicial review reaffirmed in Norton v. Southern Utah Wilderness Alliance, 124 S. Ct. 2373 (2004). A court may direct an agency to take "a discrete agency action that it is required to take." Id. at 2379. It does not acquire jurisdiction to oversee all matters with any possible connection to the duty at issue.

The court's ruling (which did not involve a hearing) involved exposure of some boxes of trust documents to water or mold. Interior has assembled an extraordinary number of trust records, estimated in the Accounting Plan at 195,000 boxes. Reply Br. 12, JA 841. In the "water" incident cited by the court, 62 of those boxes were exposed to a water leak in a commercial storage facility; four of the 62 showed signs of minimal water exposure. 9/21/04 Report at 6. In the "mold" incident, 155 boxes (about half of which contained trust records) came in from the Navajo Region with mold. Id. at 8. The boxes were segregated and Interior is securing a contractor to take remedial measures. Ibid.

Although the court declared that "vital" trust records were "placed in jeopardy and/or destroyed," Mem. 3, it identified no loss of relevant information and no way in which the agency's accounting activities were impaired. Interior confronts myriad problems in gathering and maintaining trust documents created over many decades. It is clear that Interior was vigorously addressing the particular problems at issue without judicial intervention, and, in any event, APA § 706(1) "empowers a court only to compel an agency to perform a ministerial or non-discretionary act," Southern Utah, 124 S. Ct. at 2379, not to direct the conduct of daily operations.

Respectfully submitted,

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