

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AK-CHIN INDIAN COMMUNITY)	No. 06-2245 (JR)
v. DIRK KEMPTHORNE, <i>et al.</i> ,)	
)	
PASSAMAQUODDY TRIBE OF MAINE)	No. 06-2240 (JR)
v. DIRK KEMPTHORNE, <i>et al.</i> ,)	
)	
SALT RIVER PIMA-MARICOPA)	No. 06-2241 (JR)
INDIAN COMMUNITY v.)	
DIRK KEMPTHORNE, <i>et al.</i> ,)	
)	
TOHONO O'ODHAM NATION)	No. 06-2236 (JR)
v. DIRK KEMPTHORNE, <i>et al.</i> ,)	
)	
<hr/>		(Electronically filed on July 16, 2008)

**REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR
ENTRY OF TRUST RECORD PRESERVATION ORDER**

I. INTRODUCTION

In their June 20 response, Trustee-Delegates acknowledge that the preservation of tribal trust records is “essential” to the fulfillment of their fiduciary obligations.¹ Among Trustee-Delegates’ declared fiduciary obligations is the duty to “maintain[] those documents that are necessary for an accounting.” *Cobell v. Norton*, 240 F.3d 1081, 1106 (D.C. Cir. 2001) (“*Cobell VI*”). The destruction or loss of trust records potentially relevant to a complete accounting is not only “clear evidence” of a breach of this trust duty,² but it also seriously jeopardizes Trustee-Delegates’ ability ever to provide the adequate accounting sought by plaintiffs and required by law.³

Even so, there is overwhelming evidence of record before this Court that irreplaceable trust data has been damaged or lost time and time again. As this Court recently recognized, “Interior has an abysmal record of failing to prioritize the maintenance and preservation of trust documents. Many court opinions, audits and congressional committee reports have catalogued that record.” *Cobell XX*, 532 F. Supp.2d at 46. Yet, the government tries to downplay the significance of the numerous examples of record destruction and loss catalogued by plaintiffs in support of their request for entry of a Preservation Order, dismissing such incidents as “too outdated to have any significance to this litigation” (Resp. at 24) or as attributable to “roof leaks, extreme weather . . . or other unforeseeable events” (Resp. at 29).

¹ See Def. Exh. 1 – Griles 3/20/02 Memo to “All [Interior] Employees” at 2: “You must preserve Tribal Trust Documents involving all Tribes. Preserving Tribal Trust Documents is essential to enable Interior to fulfill its obligations.”

² *Cobell VI*, 240 F.3d at 1106.

³ See *Cobell v. Kempthorne*, 532 F. Supp.2d 37, 46 (D.D.C. 2008) (“*Cobell XX*”) (concluding after nearly 12 years of protracted litigation involving individual Indian trust beneficiaries’ claims for an equitable accounting, that “[a]fter decades of neglect, it is impossible to imagine that all documents necessary to perform a complete historical accounting are presently accessible to Interior”).

What is far more telling, however, is what Trustee-Delegates do not and cannot deny – that the government’s systems for preserving Indian trust data have been broken for decades. Moreover, the claimed improvements in Trustee-Delegates’ retention policies have not prevented the loss of tribal trust documents from continuing to the present day.

Indeed, the nearly 900 pages of declarations, memoranda and reports filed along with Trustee-Delegates’ June 20 Response – ostensibly to support their position that there is no need for a preservation order – instead reveal a veritable multitude of problems. Many tribal trust documents are, by defendants’ own admission, “records in jeopardy” at the local BIA offices where they are stored;⁴ such documents are at risk due to Trustee-Delegates’ failure to take even the most basic steps to protect them;⁵ and Trustee-Delegates’ retention practices are beset with

⁴ See Def. Exh. 26 – Harjo Decl., Tab A at 3 (2005 Indian Trust Examination Report findings that “[t]he Agency had 12 boxes of records in jeopardy. The twelve boxes were stored on the floor, and thus susceptible to the risk of insect infestation, fire or other potentially damaging situations”) (emphasis added); Def. Exh. 27 – Cleve Her Many Horses Decl. at ¶ 3 (referring to an Office of Trust and Review Audit (“OTRA”) finding of a “records in jeopardy situation” that existed in the Agency basement”) (emphasis added); Def. Exh. 28 – Houle Decl., Tab A at 5 (2004 Site Assessment Report finding that “trust records were found to be in jeopardy due to the lack of fire proof filing equipment, an internal sprinkler system, and a concern that flooding may occur where a majority of Land Operations and Realty trust program records are stored”) (emphasis added); Def. Exh. 43 – McDade Decl., Tab A at 4 (December 31, 2007 Memo Attachment (concerning need to “store the 35.5 cubic feet of inactive trust records . . . in fireproof filing cabinets or transfer the records . . . to the AIRR as soon as possible. These records are in jeopardy”) (emphasis added); Def. Exh. 47 – Dutschke Decl., Tab A at 6 (Assessment Report finding that “[a]ll program trust records are currently stored in non-fireproof filing cabinets and considered ‘records in jeopardy’ as they are original documents. These trust records could be destroyed or damaged if a fire occurred and would be irreplaceable”) (emphasis added); Def. Exh. 53 – Rosen Decl., Tab A at 5 (Assessment Report finding that “original (historical) trust documents dating back to the early 1900’s . . . are in jeopardy”) (emphasis added).

⁵ See Def. Exh. 19 – Duffy Decl. at ¶ 5 (tribal trust records stored in a building experiencing “occasional leaks”); Def. Exh. 37 – Langan Decl. at ¶ 3 (“some” tribal records not stored in fire-proof cabinets due to wooden floors “not conducive to support additional fire proof files”); Def. Exh. 38 – Harwood Decl. at ¶ 4 (“[F]ire-resistant cabinets are too heavy for the Region’s current location”); Def. Exh. 40 – Martinez Decl. at ¶ 8 (“Inadvertent destruction of records occurred as the result of a fire on November 21, 1980”); Def. Exh. 41 – Maytubby Decl., Tab A

“significant deficiencies . . . likely to result in deterioration or harm to Indian trust assets if not addressed”⁶ Moreover, the policy which Trustee-Delegates announced four years ago as a partial solution to such problems – classifying older tribal trust records as “inactive” and then moving them to the American Indian Records Repository (“AIRR”) in Lenexa, KS – has been frustrated by the failure of local BIA offices to comply with various Interior directives.⁷ As a result, critical trust records are vulnerable to damage or loss notwithstanding Trustee-Delegates’ claimed commitment to better protect such materials.

Under these circumstances, the Preservation Order proposed for entry by Plaintiff-Tribes should be welcomed by Trustee-Delegates as an additional tool to assist these fiduciaries in meeting the daunting challenge of rectifying the “abysmal” situation that has plagued the

at 2 (“Records that have been boxed and placed in the floors should be examined for possible infestation, decontamination, inventoried and transferred to the AIRR”); Def. Exh. 45 – Morigeau Decl. at ¶ 7 (“Inadvertent destruction as the result of fire occurred in 1968”); Def. Exh. 47 – Dutschke Decl. at ¶ 4 (“Fire safe file cabinets can’t be used in most areas in our second floor office because of weight restrictions”); Def. Exh. 55 – Siquieros Decl. at ¶ 2 (noting “small leaks . . . from the roof in the warehouse where 361.5 cubic feet of trust records are stored”); Def. Exh. 56 – Speaks Decl. at ¶ 11 (“Inadvertent flooding . . . effected [sic] lease documents covering the period of 1980 to 1986”).

⁶ See, e.g., Def. Exh. 40 – Martinez Decl., Tab B at 1 (April 11, 2008 Memo acknowledging that: “*The initial assessment report documented 35 records management deficiencies at the Pima Agency*” *Seven corrective actions remain outstanding.*”) (emphasis added); Def. Exh. 44 – Montes Decl. at ¶ 5 (referring to August 30, 2007 assessment report finding that “*inactive records had not been transferred to the American Indian Records Repository (“AIRR”)*” (emphasis added); Def. Exh. 48 – Orozco Decl., Tab A at 2 (Trust Examination Report “Executive Summary” explaining that: “*Significant deficiencies are practices that deviate from sound fiduciary principles and are likely to result in deterioration or harm to Indian trust records if not addressed and/or result in substantive noncompliance with laws, regulations or court decisions*”) (emphasis added).

⁷ See Def. Exh. 8 – 2005 Cason Memo expressing concern that “*there appears to be a considerable number of cubic feet (i.e. boxes) of inactive records at field locations and the number is continuing to grow, creating a backlog to grow, creating a backlog situation*”) (emphasis added); Def. Exh. 9 – 2006 Memo from Office of Trust Records Director advising that “[*w*]e are finding that BIA offices are not preparing records prior to the arrival of OTR’s Contractor and this is causing delays to the project”) (emphasis added); Def. Exh. 10 – 2007 Memo from CIO, Office of the Special Trustee re “Records Backlog Project” raising the same concern a year later.

government's administration of Indian trusts for so many years. Yet, with so much to be gained by having a Preservation Order in place in this litigation, Trustee-Delegates instead have filed a 45-page response in which they throw everything but the kitchen sink into their effort to resist its entry. Rather than acknowledge the clear and compelling need for the proposed Order, Trustee-Delegates argue (1) that the Court's consideration of such an Order at this stage is "premature;" (2) that any such relief cannot properly issue without Plaintiff-Tribes satisfying the more rigorous requirements for entry of a preliminary injunction; and (3) that the proposed Preservation Order is unnecessary and unduly burdensome.

As the following examination of Trustee-Delegates' arguments reveals, however, such contentions are lacking in merit. In fact, the proposed Preservation Order is clearly necessary and carefully tailored to enhance the protection of vital tribal trust records without dictating the steps Trustee-Delegates must take to accomplish this critically important objective. Contrary to what Trustee-Delegates argue, the entry of such an Order at this stage of the litigation is hardly "premature" – not when irreplaceable trust records continue to be at risk of loss and the consequences of their destruction or loss are potentially so severe. In addition, the Court's authority to issue such relief pursuant to Rule 16(c) – without Plaintiff-Tribes having to meet the more stringent requirements for a preliminary injunction as Trustee-Delegates assert – is well-established in tribal trust litigation. *See Pueblo of Laguna v. United States*, 60 Fed. Cl. 133, 137-138 (2004). Accordingly, the Preservation Order proposed by Plaintiff-Tribes should be entered forthwith.

II. ARGUMENT

A. Trustee-Delegates' Argument that a Preservation Order Would Be "Premature" is Completely Unfounded.

All of the two dozen cases in which tribal plaintiffs are seeking the entry of the Preservation Order are at least 18 months-old (the equitable accounting action brought by the Chippewa Cree Tribe of the Rocky Boy's Reservation was filed in 2002) Yet Trustee-Delegates' "threshold" argument in opposition to the Preservation Order is that any consideration of such relief at this stage would be "premature." (Resp. at 7).

The erroneous assumption underlying this argument is that Plaintiff-Tribes' equitable accounting claims are nothing more than "generic" APA review cases, and hence that the only discovery to which Plaintiff-Tribes are entitled is "discovery of the administrative record related to the agency action Plaintiff is challenging." (Resp. at 7). Trustee-Delegates completely ignore the fact that even if this were true, the tribal trust records necessary to accomplish the accounting of Plaintiff-Tribes' funds and other trust assets would need to be maintained and thus protected against the risk of destruction or loss. Instead, Trustee- Delegates assert that because Plaintiff-Tribes' entitlement to discovery has not yet been established, there is no current need for the Court to consider the entry of a Preservation Order. Trustee-Delegates even allege that the entry of such an order at this stage would exceed the Court's jurisdiction (Resp. at 8).

Such an argument fails because it is based on a fundamental misperception of what these cases are about. Plaintiff-Tribes' accounting claims do not rely on the APA for their sole cause of action. Rather, Plaintiff-Tribes' claims also are rooted in the various treaties and statutes which give rise to the trust relationship between the United States and these beneficiaries, and which invoke this Court's inherent equitable authority to enforce the terms of such trusts. (*See, e.g., Salt River Complaint* ¶¶ 9, 16).

The APA provides the necessary waiver of sovereign immunity, but Plaintiffs-Tribes' cause of action arising in equity is distinct from and in no way dependent upon the APA. This is because the accounting obligation and other duties that Plaintiff-Tribes seek to enforce in this litigation are fiduciary duties that can be enforced *outside* of the APA.⁸

Accordingly, discovery in these cases is not limited by the APA as Trustee-Delegates erroneously contend. Indeed, “[t]he narrower judicial powers appropriate under the APA do not apply . . . because the underlying lawsuit is both an Indian case and a trust case in which trustees have egregiously breached their fiduciary duties.” *Cobell v. Norton*, 391 F.3d 246, 257-58 (D.C. Cir. 2004) (“*Cobell XII*”).

Remarkably, Trustee-Delegates claim the *Cobell* case supports their “APA/no discovery” contention (*See Resp.* at 8-9). Yet in the course of this other Indian trust litigation, the Court has permitted extensive discovery in support of individual Indian beneficiaries’ equitable accounting claims. And the trust record preservation order issued by this Court in *Cobell* in August 1999 is the model for similar relief being sought by these tribal plaintiffs nine years later.⁹

Indeed, Trustee-Delegates’ “APA/no discovery” contention was squarely addressed and rejected by this Court in the *Cobell* trust litigation three and one-half years ago. In *Cobell v. Norton*, 226 F.R.D. 64 (D.D.C. 2005), Trustee-Delegates moved to quash deposition notices served on Interior officials to examine the government’s later-discredited contention that long-standing problems with IT security had been resolved. In support of their motion, Trustee-Delegates argued that the individual trust beneficiaries’ claims for an equitable accounting

⁸ As addressed in greater detail in Plaintiffs’ Principal Brief in Opposition to Defendants’ Motion to Dismiss, Plaintiff-Tribes also allege claims under § 706 of the APA as *alternative* causes of action. However, these claims are wholly distinct from Plaintiff-Tribes’ independent cause of action to enforce statutory trust terms and duties against their trustee.

⁹ *See Cobell v. Babbitt*, No. 1:96 CV01285 (August 12, 1999) (“Order Regarding Interior Department IIM Records Retention”) [Dkt No. 370].

“involv[ed] no more than judicial review of a prototypical administrative action under the APA” and that “judicial review is limited to the administrative record.” *Id.* at 92. They further contended that *prior to any discovery* “the compilation and Court review of the administrative record must be completed.” *Id.*

This Court denied the motion to quash and flatly rejected Trustee-Delegates’ attempted characterization of the individual beneficiaries’ accounting claims as “ill-founded” and “unsound.” *Id.* at 92. The Court also observed that despite their repeated attempts to do so, “Trustee-Delegates have never been successful in portraying this litigation as a typical case of judicial review of agency action.” *Id.* See also *Cobell v. Norton*, 455 F.3d 301, 307 (D.C. Cir. 2006) (“*Cobell XVIII*”) (holding that “because the underlying lawsuit is both an Indian case and a trust case in which the trustees have egregiously breached their fiduciary duties, the court retains substantial latitude, much more so than in the typical agency case, to fashion an equitable remedy”) (quotations and citations omitted).

So here, Trustee-Delegates’ attempt to portray this litigation as something it is not – in this instance to prevent the Court’s timely consideration of a Preservation Order clearly needed to halt the further loss of irreplaceable tribal trust records – should be dismissed out-of-hand. This Court clearly has inherent equitable authority to ensure the beneficiaries’ protection. See, e.g., *Village of Brookfield v. Pentis*, 101 F.2d 516, 520-21 (7th Cir. 1939) (“Courts of equity have original inherent jurisdiction to decree and enforce trusts and do whatever is necessary to preserve them from destruction”). And, where tribal trust records critical to the performance of Trustee-Delegates’ accounting duty are at risk of destruction or loss, the Court clearly has the authority to take timely action to enforce Trustee-Delegates’ fiduciary obligation to preserve and protect such materials. See *Cobell VI*, 240 F.3d at 1106 (affirming the district court’s finding

that “[t]he Treasury Department’s failure to maintain such documents is a breach of its fiduciary duty”).

Trustee-Delegates’ attempted reliance on *Cobell v. Norton*, 392 F.3d 461 (D.C. Cir. 2004 (“*Cobell XIII*”) as an obstacle to entry of the Preservation Order is entirely misplaced. To be sure, in *Cobell XIII* the D.C. Circuit vacated provisions of a 2003 structural injunction compelling Trustee-Delegates’ compliance with sixteen additional trust duties declared by the district court, holding that the court lacked the authority to “issue enforcement remedies – by any means – for trust breaches that it has not found to have occurred.” *Id.* at 474. *None* of those trust duties, however, pertained to the obligation to maintain trust records vital to the performance of Trustee-Delegates’ duty to account, which had been previously declared and affirmed in *Cobell VI*. Moreover, *Cobell XIII* reaffirmed the Court’s authority to “consider[] 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 477. And it further declared 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 478.

Accordingly, rather than impede the Court’s ability to enter the Preservation Order sought by Tribal-Plaintiffs, *Cobell XIII* actually provides further support for its entry. Here there is compelling evidence of Trustee-Delegates’ breach of their duty to maintain trust-related documents by allowing such data to be lost or destroyed. The proposed Preservation Order is precisely the “specific relief” authorized by the D.C. Circuit in *Cobell XIII* to address such a problem.

In short, this Court's hands are not tied as Trustee-Delegates suggest. The proposed Preservation Order is clearly necessary to preserve and protect trust records vital to the fulfillment of Trustee-Delegates' fiduciary duties – just as such relief was required in the *Cobell* case nine years ago. There is absolutely no reason to delay the Order's entry.

B. Trustee-Delegates' Argument that the Preservation Order Is a Request For a Preliminary Injunction is Similarly Unavailing.

Trustee-Delegates further argue that the Preservation Order may issue only if Plaintiff-Tribes satisfy the requirements for entry of a preliminary injunction. (Resp. at 10). This argument is similar to what the government contended 4-1/2 years ago in unsuccessfully opposing the preservation order for tribal trust records entered in *Pueblo of Laguna v. United States*, 60 Fed. Cl. 133 (2004). There the United States claimed that the Court of Claims was unable to issue the preservation order sought by the plaintiff tribe because it lacked the jurisdiction as an Article I court to grant such injunctive relief.

The Court of Claims rejected that argument, “relying particularly on RCFC 16” in holding that it had “the power to preserve evidence and issue orders in furtherance thereof.” *Id.* at 137. As the source of its case management authority, the *Pueblo of Laguna* court pointed to Rule 16(c), which provides that the court “may take appropriate action” with respect to “the control and scheduling of discovery,” “the need for adopting special procedures for managing potentially difficult or protracted actions” and any such “matters as may facilitate the just, speedy and inexpensive disposition of the action.” *Id.* at 137. The court thus concluded that Rule 16(c) authorized the issuance of a preservation order provided that the party requesting such relief “demonstrate[s] that it is necessary and not unduly burdensome.” *Id.* at 138.

In so holding, the *Pueblo of Laguna* court squarely addressed the argument that Trustee-Delegates once again are raising here – *i.e.*, that the more demanding requirements for issuing a

preliminary injunction would have to be satisfied before such a preservation order could issue. *Id.* at 138 n.8. The court found the government’s argument unpersuasive, observing that “a document preservation order is no more an injunction than an order requiring a party to identify witnesses or produce documents in discovery.” *Id.* It specifically rejected the need to “observe the rigors of the four-factor analysis ordinarily employed in issuing injunctions” – calling it “an approach [that] would be decidedly to put the cart before the horse.” *Id.*

The majority of courts that have addressed this issue have concluded – like the court in *Pueblo of Laguna* – that there is *no* need for a party seeking to preserve documents to satisfy the more stringent requirements for injunctive relief. *See, e.g., Treppel v. Biovail Corp.*, 233 F.R.D. 363, 370 (S.D.N.Y. 2006); *Capricorn Power Co., Inc. v. Siemens Westinghouse Power Corp.*, 220 F.R.D. 429, 431 (W.D. Pa. 2004); *and* the other case authorities cited in Plaintiffs’ April 29 Memorandum of Points and Authorities (at 7). Yet, Trustee-Delegates cite a single published district court decision from more than 40 years ago and two other more recent unpublished decisions as support for their contrary position (Resp. at 10). Notably, these same case authorities were presented to and rejected as unpersuasive by the court in *Pueblo of Laguna*. *See id.* at 138 n.8.

Defendants’ cited cases are readily distinguishable. In *Madden v. Wyeth*, 2003 WL 21443404 (N.D. Texas April 16, 2003), for example, the court declined to issue a document preservation order in a product liability suit “without some proof that evidence may be lost or destroyed without a preservation order.” *Id.* at *1. Unlike the situation here, there was no record of systematic destruction and loss of vital records dating back decades and continuing to the present day. *See also Pepsi-Cola Bottling Company of Olean v. Cargill, Inc.*, 1995 WL 283610

at *4 (D. Minn. Oct. 20, 1995) (concluding that “a Preservation Order is warranted only upon a showing that one is needed” and that “[n]o showing of need has been made here”).

So too, in *Humble Oil & Refining Co. v. Harang*, 262 F. Supp. 39 (E.D. La. 1966), the defendant charged with attempting to “conceal, destroy or otherwise plac[ing] documents beyond reach” testified under oath “that he had all of the disputed documents and that he had no intention of destroying them;” and his attorney responded to plaintiff’s allegations by offering to exchange documents through discovery. *Id.* at 43. The court in *Humble Oil* thus held that plaintiff had failed to demonstrate the threat of document destruction was real, “in view of defendant’s testimony and his attorneys’ offer.” *Id.*

Such situations are a far cry from the evidence of record in this litigation, in which unrefuted instances of record destruction and loss date back decades and continue to the present day. Indeed, the compelling need for entry of the Preservation Order sought by Plaintiff-Tribes would appear to fully satisfy the requirements for “injunctive” relief set forth in all three of Trustee-Delegates’ cited cases. *See Humble Oil, supra*, 262 F. Supp. at 43 (recognizing the court’s authority to issue a preservation order where “the rights of the parties seeking the relief are not otherwise adequately protected by ordinary legal processes”); *Madden, supra*, at *4 (preservation order to be entered “only upon an adequate showing that equitable relief is warranted”); *Pepsi-Cola Bottling, supra* at *4 (requiring a showing – as in *Pueblo of Laguna* – “that one is needed”).

Contrary to what Trustee-Delegates further assert (Resp. at 10-11), entry of the proposed Preservation Order will *not* create a potential conflict with D.C. Circuit precedent regarding when a party may be sanctioned for its failure to preserve evidence. In moving for the issuance of such an Order, plaintiffs are not asking that Trustee-Delegates should be sanctioned for their

past destruction of evidence. Rather, Plaintiff-Tribes are merely asking that the Court take steps to ensure that tribal trust documents are preserved in this litigation in view of the pattern of destruction found in *Cobell* and in the government's own reports dating back for decades. The proposed Order is intended to *minimize* the potential for the further destruction and loss of such records and thereby *reduce* the risk that sanctionable conduct will occur in the future.

Nothing in the proposed Preservation Order addresses the question as to when sanctions for violations of the Order's terms would be appropriate. That is to be left to the Court's rules and relevant D.C. Circuit precedent if the situation arises. Instead, the Preservation Order merely puts those receiving it on notice that "[f]ailure to comply with this Order may lead to the imposition of sanctions." (See ¶ 7). As the *Pueblo of Laguna* court recognized in issuing a preservation order containing the identical provision, "[s]uch an order . . . serves as fair warning that sanctions *may* be imposed should defendant instead fail adequately to protect records relevant to this action." 60 Fed. Cl. at 139 (emphasis added). In short, entry of the Order would not present the "potential conflict" with D.C. Circuit precedent that Trustee-Delegates struggle in vain to suggest.

C. The Proposed Preservation Order Satisfies the Requirements of *Pueblo of Laguna*

Trustee-Delegates acknowledge (Resp. at 12), as they must, that under the two-pronged test for entry of a preservation order adopted in *Pueblo of Laguna*, plaintiffs are entitled to such relief so long as the proposed Order is (1) necessary and (2) not unduly burdensome. *Pueblo of Laguna*, 60 Fed. Cl. at 138. The Preservation Order proposed for entry in the tribal accounting litigation clearly satisfies both of these requirements.

1. The Proposed Order is Clearly Necessary.

“To meet the first prong of this test, the proponent ordinarily must show that absent a court order, there is a significant risk that relevant evidence will be lost or destroyed[.]” *Pueblo of Laguna*, 60 Fed. Cl. at 138. This burden is “often met by demonstrating that the opposing party has lost or destroyed evidence in the past or has inadequate retention procedures in place.”

Id. Such a burden is clearly met in this instance in view of the following:

- *There is overwhelming evidence that Trustee-Delegates have “lost or destroyed” trust records essential to the fulfillment of their trust duties* – Moreover, the destruction and loss of such vital records continues to the present day. (See Plaintiff’s April 29 Memorandum of Points and Authorities at 14-27).
- *Trustee Delegates’ retention procedures have been and remain “inadequate”* – Despite Trustee-Delegates’ claims of improvement, their June 20 submissions to the Court reveal that many tribal trust records are still “records in jeopardy” and that “significant deficiencies” in Defendants’ practices have been identified and remain unresolved. (See Plaintiffs’ Reply at pages 2-3 and footnotes 4-6 thereto, *supra.*)

Rather than acknowledge these serious concerns, Trustee-Delegates assert that many of the examples of the destruction and loss of trust records catalogued in Plaintiff-Tribes’ Motion are “irrelevant,” and they further contend that the government has “cleaned up its act” since such incidents occurred. These contentions are addressed in sections (a)-(d) below.

a. Trustee-Delegates’ No “Relevance” Argument.

Trustee-Delegates assert that the many examples of destruction and loss cited by plaintiffs are not relevant here because Plaintiff-Tribes have not established that their own records have been victims of such destruction or loss. (Resp. at 13).

Contrary to what Trustee-Delegates argue, however, Plaintiff-Tribes are *not* required to show that their own trust records have been lost/destroyed to qualify for the Court’s protection. In *Pueblo of Laguna*, the Court of Claims recognized that the tribe seeking the entry of the preservation order there was requesting protection for “*different* records” than had been involved in the *Cobell* trust litigation. 60 Fed. Cl. at 139. Yet the court found the failures evidenced in *Cobell* to be “so pervasive and systematic as to provide ample support for the issuance of a document preservation order in this case.” *Id.* at 139. *See also* the July 9, 2008 Order entered in *Seminole Nation of Oklahoma v. United States*, No. 06-935L (CFC finds protection of the plaintiff tribe’s trust records to be necessary “*in light of the prior loss or destruction of documents in related cases*”) (emphasis added) (copy attached as Reply Exh. 1).

Trustee-Delegates’ reliance on *Treppel v. Biovail Corp.*, 233 F.R.D. 363 (S.D.N.Y. 2006) as suggesting the need for a more exacting showing of harm is misplaced. The court in *Treppel* declined to enter the preservation order sought by the plaintiff in that litigation because “plaintiff has not yet made the most basic showing that any documents potentially relevant to this litigation were lost.” *Id.* at 372. However, the court explicitly rejected the idea that plaintiff had to make a particularized showing “that specific documents were lost” in order to obtain such relief. The *Treppel* court recognized that it would be “difficult to evaluate the injury that might be caused by the destruction of evidence without yet knowing the content of that evidence.” *Id.* at 370.

So here, Plaintiff-Tribes are fully justified in relying upon prior incidents involving other Indian trust records than their own in support of their request for relief. Plaintiff-Tribes do not have to wait until they are able to pinpoint with precision that their own materials have been irretrievably damaged or lost to obtain the Court’s protection. This is particularly true where, as here, the numerous incidents of destruction and loss recited by Plaintiff-Tribes demonstrate a

clear pattern of failure to protect similar types of Indian trust records held by these same Trustee-Delegates. Indeed, the very purpose of the proposed Preservation Order in this litigation is to protect Plaintiff-Tribes' trust records from the identical fate.

b. Allegedly “Outdated” Examples of Destruction/Loss.

Trustee-Delegates further assert that many of the examples the Plaintiff-Tribes have provided of document destruction and loss are not relevant to this litigation because they occurred before the construction of the AIRR four years ago and the implementation of Trustee-Delegates' policy for moving “inactive” trust records there for safekeeping (Resp. at 25-28). Yet, a number of the examples cited by Plaintiff-Tribes in their April 29 Motion (including the destruction of 15 boxes by the Treasury subcontractor and the 9 boxes of trust records damaged by water and mold currently under investigation by Judge Allegra in the CFC) are very recent examples of destruction. These incidents, and others cited at pp. 20-27 of Plaintiffs' Memorandum of Points and Authorities, all *post-date* the completion of the AIRR.

Such post-2004 examples are, by themselves, sufficient to warrant entry of the proposed Preservation Order. Considered in light of Trustee-Delegates' “pervasive and systematic” failures, the more recent examples of destruction and loss are clearly not isolated events or the result of mere happenstance. Instead, they demonstrate that the breach of Trustee-Delegates' duty to preserve trust records remains unrectified. Taken together with the confessions of “records in jeopardy” and “significant deficiencies” contained in Defendants' June 20 submissions to this Court, the recent examples of destruction and loss cited by Plaintiff-Tribes serve to illustrate all too well that Trustee-Delegates' “pervasive and systematic” failures still have not been resolved.

c. Trustee-Delegates’ “Unavoidable Destruction” Argument.

Perhaps the most remarkable of Trustee-Delegates’ contentions is their argument that the Preservation Order is unnecessary because much of the evidence of past destruction and loss focuses on severe weather events or damage due to mold and rodents, and “such events often occur in spite of the best efforts of the persons maintaining the records” (Resp. at 28-31). Defendants clearly know better than to contend that such events are “unavoidable” – indeed, they claim to be committed to a policy of moving “inactive” trust records to the AIRR to protect against precisely such environmental risks. *See* Def. Exh. 8 –Cason Memo (“It is important that we adequately protect our records and moving them to the state-of-the-art records archives in Kansas is the best way to do that”).

As Trustee-Delegates recognize, the destruction of documents by water, fire, mold, rodents, etc. can be avoided by keeping such records up off the floor,¹⁰ by storing them in fireproof cabinets,¹¹ by placing them in locations free of water leaks, etc.¹² Indeed, the Court and numerous reports have taken Trustee-Delegates to task for allowing the destruction of trust records in their custody and control. Yet, notwithstanding the recognition nearly 20 years ago of serious environmental risks that needed to be corrected, these same problems have been permitted to persist.

When such incidents of damage or loss occur, they need to be brought to light immediately so that the Court can take steps (as CFC Judge Allegra has done in response to the

¹⁰ *See, e.g.*, Def. Exh. 26 – Harjo Decl., Tab A at 3 (finding boxes of trust records “stacked on the floor, and thus susceptible to the risk of insect infestation, fire or other potentially damaging situations”).

¹¹ *See, e.g.*, Def. Exh. 47 – Dutschke Decl., Tab A at 4 (finding “irreplaceable” trust records “currently stored in non-fireproof filing cabinets and considered records in jeopardy”).

¹² *See, e.g.*, Def. Exh. 28 – Houle Decl., Tab A at 5 (finding a “records in jeopardy situation” for trust records due in part to “a concern that flooding may occur”).

government's April 15, 2008 notice of nine boxes of mold/water damaged trust records) to make sure additional documents are not destroyed (or further damaged) by the elements.¹³ Obviously, if vital tribal trust records are not protected against destruction or loss prior to their being classified as "inactive" and shipped to the AIRR, Trustee-Delegates' entire preservation effort risks being undermined.¹⁴

d. The Government's Claimed Effort to Clean Up Its Act.

Trustee-Delegates devote nearly a dozen pages of their June 20 Response to a description of the efforts they have made to correct the deficiencies in their system for managing Indian trust documents. (*See Resp.* at pp. 14-24). Despite these representations, and despite additional policies to preserve records referenced in Trustee-Delegates' June 20 submissions to the Court, the incidents of document destruction and loss persist. Alas, trust records continue to be "in jeopardy" at numerous Interior locations – vulnerable to further destruction and loss due to "significant deficiencies" in Trustee-Delegates' handling and storage practices. *See* footnotes 4-6, *supra*.

Even so, Trustee-Delegates assert that the proposed Preservation Order is unnecessary because it would add nothing to the regime already in place (*Resp.* at 20-24). This is plainly

¹³ Defendant's court-mandated investigation of the water/mold issue in *Navajo Nation v. United States*, No. 06-945L has resulted in its disclosure of seven additional boxes of trust records apparently exposed to water or mold and now undergoing further testing and possible remediation. *See* "Defendant's Supplemental Notification of Additional Discovery of the Possible Presence of Mold or Water Damage to Documents" dated July 8, 2008 (copy attached as Reply Exh. 2).

¹⁴ As this Court has recently recognized, while "the [Lenexa facility] reflects a significant improvement in the conditions and treatment of the records that have survived the cramped, disorganized, flooded, rat-infested storage facilities in which some of them were found, it is unclear from the evidence presented at trial what percentage of total IIM records that should have been maintained over the life of the trust have actually been recovered and shipped to the AIRR." *Cobell XX*, 532 F. Supp.2d at 46. The serious problems revealed in Defendants' June 20 submissions suggest there is cause for a similar concern with respect to *tribal* trust records.

incorrect. For example, the retention efforts the government describes in its Response – including the issuance of inter-agency instructions and “reminder” notices, training, etc. – for the most part do *not* extend to contractors (despite the 2007 loss of 15 boxes of trust records blamed on an employee at a storage facility retained by the contractor holding such materials for Treasury). The proposed Preservation Order, by contrast, would require that contractors be advised of the terms of the Preservation Order and sign an acknowledgment of their receipt of the Order.

In addition, without such an Order, there is nothing that imposes an affirmative duty upon Trustee-Delegates to notify the Court of the destruction or loss of trust records. This is a particularly important requirement, because it gives the Court an opportunity to investigate the cause of any reported violation and to monitor any resulting corrective action when/if an incident of loss or destruction occurs. As the record in *Cobell* and the CFC tribal trust cases reflects all too well, the government has a track record of waiting months before bringing such incidents to the Court’s attention. Plaintiff-Tribes and this Court should not be “kept in the dark” regarding incidents which threaten irreparable harm to the trust beneficiaries and jeopardize the very integrity of the judicial process.

2. The Proposed Preservation Order Is Not Unduly Burdensome.

To satisfy the second prong of the *Pueblo of Laguna* test, “the proponent must show that the particular steps to be adopted will be effective, but not overbroad.” *Pueblo of Laguna*, 60 Fed. Cl. at 138. The proposed Preservation Order clearly satisfies this additional requirement in view of the following:

- Similar to the orders entered in other tribal trust cases, the Preservation Order directs Trustee-Delegates to take “reasonable steps to preserve all documents, data or tangible

things,” and to report immediately any destruction or loss of records (*see* ¶¶ 1(a) and 2(c)). The Order does *not* purport to dictate the specific steps Trustee-Delegates must take to achieve compliance with its terms (*see* ¶ 2). Rather, here, as in *Pueblo of Laguna*, the Order’s provisions “rel[y] upon the expectation that defendant . . . is best situated to review the government’s record retention processes and ensure their continued effectiveness.” 60 Fed. Cl. at 138.

- The proposed Preservation Order is substantially less burdensome than orders entered in other tribal trust cases. It does not require that Trustee-Delegates make inactive records available to plaintiffs for inspection prior to the service of a formal discovery request for those records. *See id.* at 141-42. Nor do plaintiffs seek through the entry of the Preservation Order to compel the government to index all documents, data and tangible things covered by the order. *See id.* at 141-42. The Preservation Order only requires that when Trustee-Delegates anticipate re-locating Plaintiff-Tribes’ trust records, they provide at least 20 days advance notice of the movement as well as a copy of the move plan and certain other specified information (*see* ¶ 4). As addressed below, this is a comparatively minor burden given the special risk of loss or confusion of records that inevitably attends any attempt to relocate the documents.
- The only provision not included in preservation orders previously entered in other trust cases is the requirement that for each employee or agent of Defendants, their departments, agencies, offices, divisions *and contractors*, who have custody of plaintiffs’ tribal trust records, that person must be advised of the terms of the Preservation Order, be provided with a copy of the Order and required to sign an acknowledgment (*see* ¶ 2(b)).

Such a requirement is significantly less burdensome than the inspection and indexing requirements imposed under the orders entered in other tribal cases.

Nevertheless, Trustee-Delegates assert several concerns with respect to the claimed impact of the proposed Order (Resp. at 36-43). These contentions are addressed in sections (a)-(c) below.

a. The Scope of the Preservation Order.

Like the preservation order entered in *Cobell* nine years ago, the Preservation Order proposed for entry here would require that Trustee-Delegates take reasonable steps to protect any documents which “embody, refer or relate to the accounts or assets held in trust by Defendants and their agents.” (See ¶ 1(a)). The government takes issue with the scope of the Order, however, contending that it goes “far beyond any reading of the permissible scope of discovery” under the Rules (Resp. at 43).

This is incorrect. In this litigation, Plaintiff-Tribes seek a complete and accurate historical accounting of the trust funds and other assets held in trust for them by Trustee-Delegates. To fulfill such an obligation, it will be Trustee-Delegates’ responsibility to provide an accounting that is “sufficient to serve the purposes for which a trust accounting is typically conducted,” and that contains “sufficient information for the beneficiary readily to ascertain whether the trust has been faithfully carved out.” *Cobell VI*, 240 F.3d at 1103. It is thus conceivable that virtually all of the tribal trust records in Trustee-Delegates’ possession -- and then some -- may be needed to come anywhere close to providing the “adequate” accounting the law requires. At this stage of the litigation, when Trustee-Delegates have not even taken the “first step” of developing a plan for fulfilling their accounting obligations, clearly they would be

acting at their peril (and threatening Plaintiff-Tribes with irreparable injury) by failing to maintain and protect *all* records relating to plaintiffs' trust funds and assets.¹⁵

In complaining about the scope of the proposed Order, Trustee-Delegates ignore the difficulty that would be presented for individuals endeavoring to comply with the Order if it were worded so as to require the preservation of only those trust records that are “relevant . . . to the subject matter of the pending litigation.” So worded, compliance would be a challenge for even an attorney familiar with the tribal trust accounting litigation and with access to the Complaints and Answers filed by the parties. Indeed, as the Treasury Department recognized four years ago when presenting its plan for compliance with the CFC preservation order in *Pueblo of Laguna*: “There are literally thousands of good people, from clerks to managers, who need more certain guidance in order to apply this order to their daily business operations.” Def. Exh. 54 at Tab A (“Status Report on the U.S. Department of the Treasury’s Compliance Monitoring Mechanism, etc.” at 1).

Like the preservation order this Court entered in *Cobell*, the proposed Order takes the “guesswork” out of the process for determining which trust-related materials should be protected. Consistent with this approach, “close calls” regarding whether or not to retain trust records are to be resolved in favor of preservation (§ 1(b)); and, in the event of any uncertainty, Trustee-Delegates are to confer with Plaintiff-Tribes (*see id.*). The inclusion of such provisions clearly will reduce the risk of non-compliance with the Court’s Order. More importantly, they

¹⁵ Certain of Trustee-Delegates’ communications regarding the retention of tribal trust records appear to recognize this. *See* Def. Exh. 6 – 2007 Jensen Memo at 2 advising that the “Litigation Hold” placed on tribal trust records covers “*anything reflecting or relating to . . . [a]ny asset, such as funds, land, minerals, forestry, sand and gravel, or other resources, that is, or at any time has been, held in trust by the United States or its agents . . .*” (emphasis added).

should help to prevent vital trust records from being irretrievably lost due to mistakes in judgment regarding which materials are to be retained.

b. The Order’s “Acknowledgment” Requirement.

This is an important provision of the proposed Preservation Order. Ensuring that every custodian knows and understands his or her obligations to preserve Plaintiff-Tribes’ trust records is critical. And yet, literally dozens of the declarations of Interior employees filed with the Court on June 20 complain that requiring those in possession of trust records to execute such acknowledgments “would effectively result in the employees reporting to plaintiff’s counsel rather than to their supervisors.” *See, e.g.*, Def. Exh. 13 – Bourland Decl. at ¶ 5(a).

Such a concern is unwarranted – it reflects a fundamental misunderstanding of the proposed Order and what it requires. In fact, the executed acknowledgments are to be maintained by Defendants’ counsel of record – *not* plaintiffs’ attorneys. (*See* ¶ 2(b)). Attorneys representing the Tribal-Plaintiffs will not have access to the signed acknowledgment so long as Trustee-Delegates comply with the Order’s terms. Only in the event of the destruction or loss of tribal trust records necessitating notification of the Court will any such acknowledgments be disclosed, and then only with respect to “those involved with the violation.” (*See* ¶ 2(c)). Accordingly, the concern raised in the declarations submitted by Defendants is completely unfounded.

c. The Order’s “Notice-of-Movement” Requirement.

Trustee-Delegates also object to the requirement that Plaintiff-Tribes’ be notified in advance of the transfer of their trust records from one location to another (Resp. at 37). Trustee-Delegates do so despite the fact that such a provision is substantially less burdensome than requiring the government to index all documents, data and tangible things covered by the Order –

a provision imposed in other preservation orders entered in tribal trust litigation. Instead, the proposed Order would only require that when Trustee-Delegates anticipate re-locating Plaintiff-Tribes' trust records, they provide at least 20 days' advance notice and a copy of the "move plan," "box inventories" and "descriptions of the records being moved" (among other transfer-related information) (*see* ¶ 4).

This is a relatively minor burden given the special risk of loss or confusion of records that attend the re-location of such documents.¹⁶ Nevertheless, Trustee-Delegates go to great lengths to try to create the impression the Order's "notice of movement" provision is so overbroad it would be triggered by virtually any movement of trust records in conjunction with Defendant's use or handling of those materials. That is simply *not* the case – as the "move plan," "box inventories" and related references in ¶ 4 should make abundantly clear. Rather, this provision of the proposed Order will apply *only* when the location for maintaining or storing Plaintiff-Tribes' trust records is about to change. The "notice-of-movement" requirement is clearly warranted under such circumstances.

D. Trustee-Delegates' Attempt to Subject Plaintiffs to a Preservation Order is Baseless and it Should Be Rejected Out-of-Hand.

After spending more than 40 pages of their June Response arguing against the entry of the Preservation Order proposed by Plaintiff-Tribes, Trustee-Delegates do an abrupt about-face and assert that if such an Order is entered, it should be binding on "all parties to the litigation" (Resp. at 44). However, *nothing* in the record supports Trustee-Delegates' demand to make the

¹⁶ Indeed, it has been the experience of plaintiffs in other tribal trust litigation that – due to "deficiencies" in the "BISS" database developed by the government for identifying trust records stored at the AIRR facility – it is "virtually impossible . . . to locate specific documents at the AIRR "relevant to Tribal breach of trust claims." *See* Declaration of Jim Parris in *Navajo Nation v. United States*, No. 06-945L, dated August 3, 2007 (copy attached as Reply Exh. 3) at ¶ 11. Sacrificing access to Plaintiff-Tribes' own records should not be the price to be paid for protecting such materials.

Order reciprocal to Plaintiff-Tribes. To the contrary, Defendants' June 20 submissions show the complete absence of any need for the Court to consider doing so. *See, e.g.*, Def. Exh. 17, Tab A at 3 (noting that “*it has been the practice of the [Salt River] Community not to destroy any records*”) (emphasis added).

As the evidence of record before the Court so clearly reflects, there is a compelling need to compel Defendants' preservation of trust records in this litigation – just as there was in *Cobell* nine years ago, and more recently in *Pueblo of Laguna* and a half dozen other CFC tribal trust cases. It is the government that has the “abysmal record” as trustee of failing to protect and maintain such records. The same cannot be said about the Plaintiff-Tribes. Each party must satisfy its own burden of proof, and Trustee-Delegates have made no attempt to do so here.

The government cites *United States v. Magnesium Corp. of Am.*, 2006 WL 2350155 (D. Utah 2006), an unpublished position by a magistrate judge, as support for its “reciprocity” argument. In that case, the United States asked that a preservation order be entered against the defendant. The defendant did not object to the request but asked that it be reciprocated. The judge simply agreed it would be “equitable” for the order to be reciprocal, without engaging in the analysis set forth in *Pueblo of Laguna* or other similar cases.

Here, it would be manifestly “*inequitable*” to impose a Preservation Order on Plaintiff-Tribes. It is Trustee-Delegates – *not* these trust beneficiaries – who are obliged as fiduciaries to retain and preserve Indian trust records and that have been guilty of “decades of neglect” in the performance of this trust duty. Absent any basis in fact for making the proposed Order “binding” as to Plaintiff-Tribes, Trustee-Delegates' unwarranted demand for reciprocity should be rejected out-of-hand.

III. CONCLUSION

For all of the foregoing reasons, Plaintiff-Tribes respectfully request that the Court grant their request for relief and enter the proposed Preservation Order accompanying their April 29 motion. Plaintiff-Tribes further request that a similar form of Order be issued in all of the other tribal accounting cases pending in this Court in which plaintiffs have joined in requesting such relief.

This 16th day of July, 2008.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR ENTRY OF TRUST RECORD PRESERVATION ORDER was electronically filed using the Court's ECF system and that the below-listed counsel are ECF users and will be served via the ECF System:

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This 16th day of July, 2008.

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