IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANTS' BRIEF
IN RESPONSE TO ORDER OF FEBRUARY 23, 2005

By Order dated February 23, 2005, this Court reissued the "Historical Accounting" portions of the September 25, 2003 Structural Injunction, as well as the Structural Injunction's "General Provisions." The Court further directed the parties to file briefs setting forth their positions concerning the effect of the D.C. Circuit's December 10, 2004, decision in Cobell v. Norton, 392 F.3d 461 (D.C. Cir. 2004), upon all provisions of this Court's September 25, 2003 Structural Injunction other than the reissued provisions.

As set out below, the Court of Appeals vacated the Structural Injunction with the exception of the requirement that the government complete and file its "To-Be Plan." Defendants have now completed and filed the "To-Be Plan" as well as the Fiduciary Trust Model with the Court. Dkt. No. 2882. As the Court of Appeals explained, however, the plan cannot be used "as a device for indefinitely extended all-purpose supervision of the defendants' compliance with the sixteen general fiduciary duties listed." 392 F.3d at 474. The Court of Appeals also held that Interior could not be required to implement its Comprehensive Plan, including the "To-

Be Plan," explaining that such a requirement amounts to an impermissible order to obey the law in managing the trusts. See id. at 475.

The Court of Appeals stated that this Court's authority "is limited to considering specific claims that Interior breached particular statutory trust duties, understood in light of the common law of trusts, and to ordering specific relief for those breaches." Id. at 477. Thus, no basis exists for reissuing those aspects of the Structural Injunction vacated by the Court of Appeals.

STATEMENT

Although the Court is thoroughly familiar with the background of this case, a brief synopsis is provided below to place the most recent Court of Appeals decision in context.

A. Background.

In 1994, Congress enacted the American Indian Trust Fund Management Reform Act, Pub. L. No. 103-412, 108 Stat. 4239 ("1994 Act"). Section 102(a) provides that "[t]he Secretary shall account for the daily and annual balance of all funds held in trust by the United States for the benefit of an Indian tribe or an individual Indian which are deposited or invested pursuant to the Act of June 24, 1938 [25 U.S.C. § 162a]." 1994 Act, § 102, 25 U.S.C. § 4011(a).

In 1999, this Court issued a declaratory judgment holding that Interior had an enforceable duty to provide an accounting for money in the IIM trust. Because the agency had not yet provided such an accounting, the Court remanded the matter to allow Interior the opportunity to come into compliance. The Court retained jurisdiction for five years, and required Interior to file quarterly reports explaining the steps taken to rectify the breaches found. Cobell v. Babbitt, 91 F. Supp. 2d 1 (D.D.C. 1999), aff'd, Cobell v. Norton, 240 F.3d 1081 (D.C. Cir. 2001) (clarifying that the actual legal breach was failure to provide an accounting).

B. The Structural Injunction.

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

In July 2003, the Court of Appeals vacated the contempt ruling. The Court of Appeals held that the contempt order did not fall within the civil contempt authority. The Court also held that, contrary to findings made by the district court, the record demonstrated that "in her first six months in office Secretary Norton took significant steps toward completing an accounting." Cobell v. Norton, 334 F.3d 1128, 1148 (D.C. Cir. 2003).

Meanwhile, in January 2003, Interior complied with this Court's order to submit accounting and fiduciary obligations compliance plans. The Historical Accounting Plan for Individual Indian Money Accounts ("Accounting Plan") set out Interior's plan to complete an accounting. The Fiduciary Obligations Compliance Plan addressed in detail how Interior was complying and intended to comply with its fiduciary obligations as they related to accounting for trust funds. Interior later submitted, for the Court's information, its Comprehensive Trust Management Plan ("Comprehensive Plan"), which included the matters addressed in the Fiduciary Obligations Compliance Plan and addressed other reform efforts outside the scope of this case, such as the management of trust lands and tribal trusts.

This Court conducted a 44-day trial beginning in May 2003. Following the trial, the Court issued a Structural Injunction in September 2003 encompassing both the performance of an accounting and the implementation of a broad program of trust reform. Cobell v. Norton, 283 F. Supp. 2d 66 (D.D.C. 2003).

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

ARGUMENT

I. With The Exception Of The Requirement That Interior Complete and File the "To-Be Plan," The Court of Appeals Vacated The Structural Injunction In Its Entirety And Made Clear That The Injunction Exceeded This Court's Authority.

The December 10, 2004 Court of Appeals decision vacated the September 25, 2003 Structural Injunction with only a single exception, the requirement that Interior complete and file its "To-Be Plan." The mandate provides that "the 'historical accounting' elements of the injunction are vacated and the remainder of the injunction, aside from the requirement that Interior complete its To-Be plan, is vacated and remanded to the district court for revisions, in accordance with the opinion" of December 10, 2004. Jan. 25, 2005 Mandate; see also 392 F.3d at 478.

The Court of Appeals sustained the requirement that Interior complete and file its "To-Be Plan," but only to the extent that the requirement serves as "a device to gather information for the court[.]" 392 F.3d at 474. In all other respects, the Court not only vacated the Structural Injunction but also clarified that the injunction exceeded this Court's authority.

The Court of Appeals vacated the requirement that Interior implement the Comprehensive Plan, including the "To-Be Plan." Id. at 475. The Court of Appeals explained that, in the absence of specific findings of unreasonable delay in Interior's performance of its fiduciary duties, the implementation requirement amounts to an impermissible order to obey the law in managing the trusts. Id. The Court of Appeals also vacated the requirement that the government identify aspects of the "To-Be Plan" that might be deemed inconsistent with the government's fiduciary duties, explaining that this provision "turns the litigation process on its head" by assigning Defendants the task of identifying flaws in their own filings. Id. at 474.

The Court of Appeals stressed that this Court may not use the plan "as a device for indefinitely extended all-purpose supervision" of Interior's compliance with its fiduciary duties. Id. The Court of Appeals noted that this Court had "used language suggesting an intent to take complete charge of the details of whatever plan Interior might submit: 'If the court [concludes that the plan will not satisfy defendants' legal obligation], it may decide to modify the institutional defendant's plan, adopt a plan submitted by another entity, or formulate a plan of its own that will satisfy the defendant's liability.'" Id. at 475 (quoting 283 F. Supp. 2d at 142). The Court of Appeals contrasted this declaration with the Supreme Court's holding in Norton v. Southern Utah Wilderness Alliance, 124 S. Ct. 2373 (2004), that a court is empowered "'only to compel an agency . . . to take action upon a matter, without directing *how* it shall act.'" 392 F.3d at 475 (quoting 124 S. Ct. at 2379). The Court explained:

> 'If courts were empowered to enter general orders compelling compliance with broad statutory mandates, they would necessarily be empowered, as well, to determine whether compliance was achieved--which would mean that it would ultimately become the task of the supervising court, rather than the agency, to work out

> compliance with the broad statutory mandate, injecting the judge into day-to-day agency management .... The prospect of pervasive oversight by federal courts over the manner and pace of agency compliance with such [broad] congressional directives is not contemplated by the APA.'

Id. at 472 (quoting Southern Utah, 124 S. Ct. at 2381). The Court of Appeals stressed that this Court "may not micromanage court-ordered reform efforts undertaken to comply with general trust duties enumerated by the court, and then subject defendants to findings of contempt for failure to implement such reforms." Id. at 478.

The Court of Appeals also addressed the manner in which common law trust duties may inform statutory duties, observing that this Court had "abstracted the common law duties from any statutory basis." Id. at 471. The Court explained that common law trust duties could not be incorporated into federal law in this manner. Instead, a statutory obligation must first be identified. Id. at 472.

The Court of Appeals also made clear that analogies to the law governing private trustees do not provide a basis for the vacated injunction. The Court of Appeals observed that "while the expenditures that plaintiffs seek are to be made out of appropriated funds, trust expenses for private trusts are normally met out of the trust funds themselves," so that "plaintiffs here are free of private beneficiaries' incentive not to urge judicial compulsion of wasteful expenditures." Id. at 473. In addition, the Court explained that even private trustees, though "held to high fiduciary standards, are generally free of direct judicial control over their methods of implementing these duties, and trustee choices of methods are reviewable only to prevent an abuse by the trustee of his discretion." Id. (internal quotation marks and citations omitted).

As the Court of Appeals explained in summary, this Court's authority "is limited to considering specific claims that Interior breached particular statutory trust duties, understood in light of the common law of trusts, and to ordering specific relief for those breaches." Id. at 477. As this Court has acknowledged, Plaintiffs' "single 'live' cause of action seeks a remedy for [failure to provide an accounting]," and the remedy available is "limited to ensuring that the defendants produce the requisite accounting of the Indian trust." Cobell v. Norton, No. 96-1285, 2005 WL 310516, *8 (D.D.C. Feb. 8, 2005).

As noted, the government has filed the "To-Be Plan" as well as the Fiduciary Trust Model with this Court, thereby satisfying the only obligation sustained by the Court of Appeals. As the Court of Appeals' decision prescribes, the premise of the remainder of the injunction was legally flawed and no basis exists for its reinstatement.

Dated: March 15, 2005

Respectfully submitted,

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Oppositions and Replies

1:96-cv-01285-RCL COBELL, et al v. NORTON, et al

U.S. District Court

District of Columbia

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