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

ELOUISE PEPION COBELL, et al.,

Plaintiffs-Appellees,

v.

GALE A. NORTON,
Secretary of the Interior, et al.,

Defendants-Appellants.

No. 03-5314

RESPONSE TO PLAINTIFFS' EMERGENCY MOTION FOR EXPEDITED BRIEFING AND ARGUMENT

Defendants-appellants, Gale Norton, Secretary of the Interior, et al., respectfully respond to plaintiffs' emergency motion for expedited briefing and oral argument.

The government has no objection to proceeding on an expedited basis if this Court believes that course appropriate. We respond to make four points.

First, plaintiffs' motion does not address the impact of recently enacted legislation on the advisability of expedition.

Second, plaintiffs' assertions of harm, twice considered by this Court in its stay rulings, give rise to no "emergency."

Third, if the Court determines that expedition is appropriate, we would ask for a modest extension of the briefing schedule proposed by plaintiffs as well as an enlargement of the word count for the parties' briefs.

Fourth, because we believe that this appeal should, if possible, be heard on the same schedule as the government's related appeal in No. 03-5262, we would ask that the scheduling of the appeal in No. 03-5262 parallel the scheduling of the present appeal whether or not the Court orders expedition.

BACKGROUND

The background to the present order is set out in detail in our Motion for Stay Pending Appeal and subsequent filings. In brief, the American Indian Trust Fund Management Reform Act, enacted in

1994, provides that the Secretary of the Interior "shall account for the daily and annual balance of 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 (25 U.S.C. 162a)." Pub. L. 103-412, § 102(a), 25 U.S.C. § 4011(a). Approximately $400 million are held in trust in these accounts.

Plaintiffs brought suit in 1996, asserting statutory and common law claims with regard to the funds held in Individual Indian Money accounts. The district court dismissed plaintiffs' common law trust claims, but concluded that plaintiffs' "statutorily-based claims against the government can be brought under the APA." Cobell v. Babbitt, 91 F. Supp. 2d 1, 29 (D.D.C. 1999). The court issued a declaratory judgment holding that Interior had an enforceable duty to provide an accounting for IIM funds. The declaratory judgment also purported to declare breaches of trust obligations with respect to a variety of other matters, including staffing and computer support. Id. at 49-50, 58.

This Court largely affirmed, concluding that agency action had been improperly delayed under governing Administrative Procedure Act ("APA") standards. Cobell v. Norton, 240 F.3d 1081, 1108 (D.C. Cir. 2001). The Court explained, however, that the only actionable breach of duty was the failure to produce an accounting, and required the district court to amend its order to the extent that it purported to exercise jurisdiction over other related duties such as the management of computer systems. Id. at 1106.

The district court did not amend its order, however, and with the aid of a Court Monitor and a Special Master, launched detailed inquiries into computer systems, information security, and a variety of other subjects. See Cobell v. Norton, 334 F.3d 1128,1134-35 (D.C. Cir. 2003). In 2002, based on purported failures to initiate a historical accounting and claimed inaccuracies in the court-ordered progress reports, the court held the Secretary of the Interior and an Assistant Secretary in contempt, Cobell v. Norton, 226 F. Supp. 2d 1 (D.D.C. 2002), concluding that "Secretary Norton and Assistant Secretary McCaleb can now rightfully take their place * * * in the pantheon of unfit trustee-delegates." Id. at 161.

This Court reversed and vacated the contempt ruling, noting, inter alia, that the record demonstrated that "in her first six months in office Secretary Norton took significant steps toward

completing an accounting," and that the court-appointed monitor had recognized that the Office of Historical Trust Accounting created by Secretary Norton had "'made more progress . . . in six months [July through December, 2001] than the past administration did in six years.'" 334 F.3d at 1148. The Court explained that "[t]hese uncontested facts are inconsistent with a finding that Secretary Norton failed to" initiate a historical accounting. Id. With respect to the remaining contempt charges, the Court described key aspects of the district court's reasoning as "mystifying," id. at 1149, and "inconceivable," id. at 1150.

Subsequently, the district court conducted a 44-day trial to consider, among other things, an accounting plan submitted by Interior which provided for the completion of an accounting within five years at a cost of $335 million. The court also considered plans, which it had ordered the parties to file, regarding a broad array of trust management matters. It then issued two opinions totaling 361 pages and a "structural injunction" consisting of 18 pages of detailed requirements with regard to virtually all aspects of trust management. The court relied heavily on the findings of its contempt ruling because, in the district court's view, they had not been set aside by this Court. See 283 F. Supp. 2d 66, 85 (D.D.C. 2003). The district court explained that it was issuing a structural injunction, rather than remanding to the agency, because it did not trust the Secretary or her subordinates to carry out their official duties. See id. at 225. The injunction rejects virtually every crucial premise of the government's accounting plan.

Congress reacted swiftly to the district court's order, which the government estimates would require expenditures of at least $ 6billion. See Declaration of Associate Deputy Secretary of the Interior James E. Cason at 5, Exhibit A to appellants' motion for stay pending appeal. Congress declared that it had previously "stated in no uncertain terms that it would not appropriate billions of dollars for a historical accounting." H.R. Conf. Rep. 108-330, at 117 (Oct. 28, 2003). Congress stressed that it would be "devastating to Indian country" to divert billions of dollars in the manner required by the court's injunction. Ibid. Believing that urgent action was required, Congress enacted Pub. L. 108-108, which provides:

> [N]othing in the American Indian Trust Management Reform Act of 1994, Public Law 103-412, or in any other statute, and no principle of common law, shall be construed or applied to require the Department of the Interior to commence or continue historical accounting activities with respect to the Individual Indian Money Trust until the earlier of the following shall have occurred:
>
> > (a) Congress shall have amended the American Indian Trust Management Reform Act of 1994 to delineate the specific historical accounting obligations of the Department of the Interior with respect to the Individual Indian Money Trust; or
> >
> > (b) December 31, 2004[.]

The government sought a stay of the structural injunction pending appeal to this Court, urging that the "structural injunction" was plainly contrary to Pub. L. No. 108-108 and that the injunction had at all times been without legal basis. This Court issued an administrative stay and subsequently issued a stay pending appeal. Plaintiffs have now moved for expedition.

DISCUSSION

1. This case has long come loose from its moorings. An action to compel action unreasonably delayed has become a vehicle for an unprecedented judicial assumption of federal agency responsibilities without basis in law or in the voluminous record. The government is eager for a final resolution of this controversy and stands ready to proceed on an expedited schedule if the Court believes that course is appropriate.

Nevertheless, the enactment of Pub. L. No. 108-108 raises questions as to the efficacy of expedition. Plaintiffs' motion does not refer to the statute, and plaintiffs have at no time been able to explain how the injunction they seek to defend can plausibly be reconciled with the new legislation. Plaintiffs assert that some aspects of the injunction are wholly divorced from the performance of an accounting. See Motion for Expedition at 3. But to the extent that aspects of the injunction are unrelated to the performance of the accounting, they are beyond the jurisdiction of the district court. In any event, Congress plainly believed that the injunction flowed from the district court's understanding of the accounting provision of the 1994 Act (as the district court had itself originally indicated, see Cobell v. Babbitt, 91 F. Supp. 2d at 29 ("statutorily-based claims against the government can be brought under the APA"), and as this Court had admonished, see Cobell v. Norton, 240 F.3d at 1106, 1108

(actionable duty was failure to perform an accounting and district court order should be amended accordingly)). To require Interior to incur the costs of compliance would be flatly at odds with the purpose of Pub. L. No. 108-108.

It is unclear at this juncture precisely what future action Congress may take, and Pub. L. No. 108-108 remains in effect only until December 31, 2004. However, if the appeal is to be decided on a highly expedited schedule, it will clearly be governed by that statute.

2. Plaintiffs urge that expedition is warranted because they experience ongoing harm as a result of this Court's stay. On this basis, plaintiffs have presented this as an "emergency motion."

The government has addressed the balance of harms in moving for a stay and in opposing plaintiffs' motion to vacate. The short answer is that Congress has weighed the benefits and burdens of the injunction and reached a conclusion directly contrary to plaintiffs' assessment. Congress correctly concluded that the structural injunction "would require that vast amounts of funds be diverted away from other high-priority programs, including Indian programs." H.R. Conf. Rep. 108-330, at 117. The committee stressed that this "would be devastating to Indian country and to the other programs in the Interior bill." Ibid. As the committee explained, the expenditure of billions of dollars on an accounting "would not provide a single dollar to the plaintiffs[.]" Ibid.

Congress was not insensitive to the financial conditions of many accountholders. It recognized, however, that the diversion of billions of dollars would not improve those conditions and would adversely affect the Indian population.[1]

3. If the Court orders plenary briefing on all issues presented by the structural injunction at the time of its issuance as well as its validity under Pub. L. No. 108-108, we would request an expansion of the schedule proposed by plaintiffs. Until the Court issues its ruling, the government will not know whether it should undertake the massive briefing required. We would ask that the government be given

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[1] Moreover, as significant as the income from IIM accounts may be collectively, about 96% of the 193,800 land-based accounts receive less than $250 per year, a consequence of the repeated divisions of land interests. Declaration of Associate Deputy Secretary of the Interior James E. Cason at 2, Exh. A to appellants' motion for stay pending appeal.

40 days in which to file its opening brief and 21 days for its reply. We would also ask that the deferred Joint Appendix be due seven days after the filing of the reply brief, given the likely size of that document and the logistical problems involved in its assembly and reproduction. Finally, we would ask that the parties be given 20,000 words for their principal briefs and that the government receive 12,000 words for its reply. This appeal arises out of eight years of litigation and three trials. The order implicates fundamental principles of the limitations on judicial review of executive branch action, the interpretation of the 1994 Act, and a vast range of issues contained in the court's extensive opinions. The opinions on appeal, published at 283 F. Supp. 2d 66, comprise over 220 pages. The contempt ruling, on which the court explicitly relied, is published at 226 F. Supp.2d 1, and comprises over 160 pages. The government will also be required to address Pub. L. No. 108-108 and plaintiffs' constitutional challenge. While the government will endeavor to be as concise as possible, the requested expansion of the word count is appropriate in these circumstances.[2]

4. Finally, if the Court expedites this appeal, we would ask that it also expedite the related appeal, docketed No. 03-5262, in which the government seeks review of the district court's preliminary injunction that asserts broad judicial control over Interior's connection to the internet. The government's challenge to both injunctions involves the same legal and factual background, and the injunctions are defective for many of the same reasons. Indeed, the internet injunction could easily have been included as one of the many disparate requirements contained in the Structural Injunction. Although this Court denied the government's motion to consolidate the two appeals, we respectfully suggest that the two cases should be heard on the same schedule if possible. Conversely, if the Court

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[2] The briefing schedule on the appeal from the contempt order, No. 02-5374, cited by plaintiffs, in fact proceeded on a very different basis than that proposed here. The government filed its opening brief together with a motion to expedite. The government did not propose a specific deadline for appellee's brief.

determines not to expedite the structural injunction appeal, it should also defer scheduling of No. 03-5262.[3]

Respectfully submitted,

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[3] We note that the government has filed several submissions with the district court pursuant to the preliminary injunction order which are now pending before the court. If the district court takes further adverse action after consideration of these submissions, expedition of No. 03-5262 may become necessary regardless of the scheduling of the structural injunction appeal.

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of February, 2004, I am causing copies of the foregoing response to be sent to the Court by hand delivery and to be served on the following counsel by first class mail and by fax:

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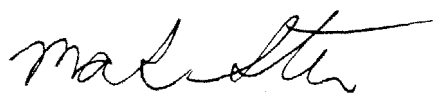

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