

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT

JAN 19 2006

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

ELUISE PEPION COBELL, et al.,

Plaintiffs-Appellees,

v.

No. 05-5269

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

Defendants-Appellants.

ELUISE PEPION COBELL, et al.,

Plaintiffs-Appellees,

v.

No. 05-5388

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

Defendants-Appellants.

**APPELLANTS' MOTION TO SCHEDULE ARGUMENT IN NO. 05-5269
BEFORE THE PANEL HEARING ARGUMENT IN NO. 05-5388**

Defendants-appellants, the Secretary of the Interior, et al., respectfully request that argument in Cobell v. Norton, No. 05-5269 be heard by the same panel that will hear argument in Cobell v. Norton, No. 05-5388. This Court has already directed that argument in No. 05-5388 be heard in April 2006. It has not indicated when argument will be scheduled in No. 05-5269. Briefing in No. 05-5269 will be completed on February 10, 2006, approximately one month before briefing will be completed in No. 05-5388.

BACKGROUND

These appeals arise out of a lawsuit filed in 1996 by a class of present and former holders of Individual Indian Money accounts, which are held in trust by the Department of the Interior. To date, this Court has issued six published decisions arising out of this litigation: (1) Cobell v. Norton, 240 F.3d 1081, 1108 (D.C. Cir. 2001) (holding that Interior had unreasonably delayed performance of historical accounting activities and remanding to the agency for the performance of those activities); (2) Cobell v. Norton, 334 F.3d 1128 (D.C. Cir. 2003) (reversing an order of contempt against the Secretary of the Interior and requiring the disqualification of Special Master-Monitor Kieffer); (3) Cobell v. Norton, 392 F.3d 461 (D.C. Cir. 2004) (reversing structural injunction governing Interior's accounting and other trust-related activities); (4) In re Brooks, 383 F.3d 1036 (D.C. Cir. 2004) (requiring the disqualification of Special Master Balaran from contempt proceedings involving 37 individuals) (5) Cobell v. Norton, 391 F.3d 251 (D.C. Cir. 2004) (reversing injunction requiring Interior to disconnect major computer systems from the internet); (6) Cobell v. Norton, 428 F.3d 1070 (D.C. Cir. 2005) (reversing re-issued structural injunction governing Interior's accounting activities). On October 14, 2005, the Court heard oral argument in a seventh matter, In re Norton, No. 03-5288 (government petition seeking the disqualification of Special Master Balaran from the case).

The two appeals that are the subject of this motion arise from orders issued in 2005.

In No. 05-5388, the government appeals from an injunction issued on October 20, 2005, requiring widespread disconnection of Interior's computer networks. Cobell v. Norton, 394 F. Supp. 2d 164 (D.D.C. 2005). This Court granted the government's motion for a stay and expedition and directed that argument be scheduled in April 2006. The government's opening brief was filed on January 11, 2006. "Final" briefs are due March 3, 2006.

In No. 05-5269, the government appeals from an order issued on July 12, 2005, that requires Interior to include in all written communications with class members, regardless of subject matter, a notice declaring that "[e]vidence introduced" in this litigation shows that Interior's trust-related information "may be unreliable" and warning class members to take into account the "questionable reliability" of Interior's trust-related information before taking action on such information. Cobell v. Norton, 229 F.R.D. 5, 24 (D.D.C. 2005). The district court declared that this ruling "represents a significant victory for the plaintiffs," and would make Indian beneficiaries aware of "the danger involved in placing any further confidence in the Department of the Interior." Id. at 23.

This Court granted the government's motion for a stay of the July 12 order pending appeal. The government's reply brief is due January 20, 2006, with "final" briefs due February 10, 2006.

Briefing in No. 05-5269 also addresses the government's

motion that the case be assigned to a different district court judge. That motion was originally filed in August 2005 in No. 05-5068, the appeal from the re-issued structural injunction, which was scheduled for argument in September 2005. Plaintiffs urged that the motion should be heard as part of the appeal from the July 12 order, and the panel in No. 05-5068 transferred the motion to the panel hearing the appeal from the July 12 order.

ARGUMENT

This Court has directed that argument in the computer disconnection appeal, No. 05-5388, be assigned to the first available date on the Court's April 2006 calendar. It is appropriate that argument in the July 12 appeal, No. 05-5269, be heard at the same time by the same panel. Scheduling the two appeals together is entirely feasible, as briefing in No. 05-5269 will be completed on February 10, 2006, approximately one month earlier than briefing in No. 05-5388. Given the complex history of the case, common to both appeals, scheduling the cases together will likely conserve judicial resources. Indeed, plaintiffs' brief in the July 12 appeal references matters in the computer disconnection trial.

CONCLUSION

For the foregoing reasons, the Court should schedule the argument in No. 05-5269 before the panel that will hear argument in No. 05-5388 in April 2006.


Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of January, 2006, I caused copies of the foregoing motion to be sent to the Court and to the following by hand delivery:

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