

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT

OCT 11 2006

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

ELCUISE PEPTON COBELL, et al.,

Plaintiffs-Appellees,

v.

No. 05-5269

DIRK KEMPTHORNE,
Secretary of the Interior, et al.,

Defendants-Appellants.

DEFENDANTS' RESPONSE TO PLAINTIFFS'
MOTION TO STAY THE MANDATE

Defendants, the Secretary of the Interior, et al., respectfully respond to plaintiffs' motion to stay the mandate in this appeal. Although plaintiffs have not identified a substantial question warranting Supreme Court review, see Fed. R. App. P. 41(d)(2), the government takes no position as to a stay.

1. Plaintiffs' motion indicates that they will ask the Supreme Court to grant certiorari to determine whether the government should have presented its reassignment request to the district court in the first instance. Motion at 2. Plaintiffs addressed this issue in a footnote of their appellate brief, see Pl. Br. 32 n.29, and this Court has made clear that reassignment questions may be considered by the court of appeals in the first instance. See, e.g., United States v. Microsoft Corp., 56 F.3d 1448, 1463-65 (D.C. Cir. 1995). See also Mackler Productions, Inc. v. Cohen, 225 F.3d 136, 146-47 (2d Cir. 2000); Haines v. Liggett Group, Inc., 975 F.2d 81, 97-98 (3d Cir. 1992); United States v. White, 846 F.2d 678, 695-96 (11th Cir. 1988); Simon v.

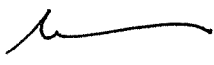
City of Clute, 825 F.2d 940, 943-44 (5th Cir. 1987). In the single Tenth Circuit case on which plaintiffs rely, the reassignment request was based in part on "several out-of-court statements" made by the judge to the United States Attorney and an Assistant United States Attorney, which the government attempted to document on appeal with an affidavit from the United States Attorney summarizing those remarks. United States v. Roberts, 88 F.3d 872, 884-85 & n.6 (10th Cir. 1996). Under those circumstances, the Tenth Circuit declined to order reassignment without giving the district court an opportunity to address the comments attributed to it. Id. at 885-86. By contrast, the government's reassignment motion in this case was not based on out-of-court communications, but on the July 12 opinion itself, in conjunction with the unbroken line of reversals. See 455 F.3d at 331.

2. Nevertheless, it does not appear that a stay of the mandate would significantly interfere with the government's ability to perform the historical accounting, and, accordingly, the government takes no position as to issuance of a stay. We understand from plaintiffs' motion that plaintiffs do not intend to seek relief from the district court before a new judge is assigned to the case. Should circumstances change, we reserve the right to seek expedited issuance of the mandate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of October, 2006, I caused copies of the foregoing response to be sent to the Court and to the following by hand delivery:

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