

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.)
)
_____)

Nos. 03-5262 & 03-5314

[Civil Action No. 96-1285 (D.D.C.)]

**APPELLANTS' REPLY IN SUPPORT OF
MOTION TO CONSOLIDATE RELATED APPEALS**

The government has moved to consolidate two appeals arising from the same litigation involving overlapping issues. Briefing the cases separately would achieve no result other than duplicative filings that will waste the resources of the parties and the Court.

As discussed in this Court's prior decisions in this litigation, and in our motion for a stay pending appeal filed in No. 03-5314, this case was filed to compel the performance of an accounting of funds held in Individual Indian Money accounts. In its initial decision, this Court affirmed what it understood to be "relatively modest" relief, Cobell v. Norton, 240 F.3d 1081, 1109 (D.C. Cir. 2001). The order affirmed by this Court provided for a remand to the Department of the Interior to proceed with an accounting. The Court explained that the only actionable breach of duty at issue in this suit was the failure to produce an accounting, and not related subsidiary matters such as computer operations, and it required the district court to amend its order accordingly. Id. at 1106. The Court further admonished that the district court should "be mindful of the limits of its jurisdiction." Id. at 1110.

The district court complied with neither the letter nor the spirit of this Court's decision. The district court did not amend its order and has asserted control over a broad range of agency operations only tangentially related to the performance of an accounting.

The two injunctions now on appeal proceed from the same mistaken understanding of the nature of this suit and the limits of the judicial role. In No. 03-5262, the government seeks review of an injunction that, in the name of information security, asserts broad judicial control over Interior's connection to the internet. In No. 03-5314, the government seeks review of a sweeping "Structural Injunction" that purports to direct the operation of virtually all aspects of Indian trust management.

Plaintiffs are correct when they assert that the internet injunction is narrower in scope than the Structural Injunction. But 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. That it took the form of a separate order in no way suggests that separate handling is appropriate. Indeed, because the legal issues and factual background of the two appeals are overlapping, the briefing directed to the specific issues raised by the internet injunction will be far more abbreviated than would be the case if the appeals were briefed separately.

Plaintiffs make the interesting suggestion that recent legislation enacted by Congress pertaining to the performance of an accounting has no bearing on the internet injunction because the latter does not involve Interior's accounting duties. Pl. Op. 5. To the extent that the injunction has no relation to the performance of an accounting, no plausible argument can be made to fit the order within the scope of the district court's jurisdiction and this Court's instructions on remand. In any event, as discussed in our motion

for a stay pending appeal, the structural injunction would be without basis even absent new legislation, and the internet injunction is similarly without basis.

The only ground offered for demanding that the two related appeals proceed on separate tracks is plaintiffs' suggestion that the internet injunction appeal might be a candidate for summary reversal. Plaintiffs base this suggestion on the proposition that the government's appeal may be unripe. Plaintiffs do not explain how an appeal from a preliminary injunction could be dismissed on ripeness grounds. The injunction has had an immediate and improper coercive effect. That the district court has yet to determine whether to order disconnection pursuant to the terms of the injunction casts no doubt on the ripeness of the appeal. Moreover, if plaintiffs had intended to move for summary affirmance in No. 03-5262, , they would presumably have done so by the deadline for filing dispositive motions which passed on November 13, 2003.

CONCLUSION

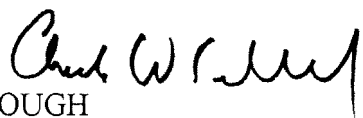
For the foregoing reasons, and for the reasons stated in our motion, the appeals in No. 03-5262 and No. 03-5314 should be consolidated.

Respectfully submitted,

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NOVEMBER 2003

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of November, 2003, I caused copies of the foregoing reply

to be sent to the Court and to the following by hand delivery:

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