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DEC - 6 2002

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

RECEIVED

ELUISE PERLON COBELL, et al.,

Plaintiffs-Appellees,

v.

No. 02-5374

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

Defendants-Appellants.

MOTION FOR EXPEDITED APPEAL AND ARGUMENT

Defendants-appellants, the Secretary of the Interior, et al., respectfully move for expedited briefing and argument of the above-captioned appeal. Simultaneously with this motion, we are filing our opening brief. For the reasons set forth below, we request that the Court order: (1) that the brief for appellees be filed within an appropriate time; (2) that the government's reply brief be filed within 14 days after appellees' brief; and (3) that oral argument be held at the Court's earliest convenience following the completion of briefing.

1.a. This case, which has previously been before this Court, concerns ongoing efforts by the Department of the Interior (DOI) to provide an accurate accounting of the money held in Individual Indian Money (IIM) accounts. In Cobell v. Babbitt, 91 F. Supp. 2d 1 (D.D.C. 1999), the district court (Lamberth, J.) issued a declaratory judgment holding that the American Indian Trust Fund Management Reform Act, 25 U.S.C. §§ 162a et seq. and 4011 et seq., requires the defendants to provide an accurate

accounting of all money in the IIM trust held for the benefit of plaintiffs, without regard to when the funds were deposited. Cobell v. Babbitt, 91 F. Supp. 2d 1 (D.D.C. 1999). The court found the government in violation of its legal obligations, and remanded the matter to allow DOI the opportunity to come into compliance. Id. at 58. The court retained jurisdiction over the matter for five years, and required DOI to file quarterly reports explaining the steps taken to rectify the breaches found. Id. at 58-59.

This Court affirmed, Cobell v. Norton, 240 F.3d 1081 (D.C. Cir. 2001), holding that defendants had a judicially enforceable duty to perform a "complete historical accounting," id. at 1102, and that defendants had failed to satisfy this obligation. At the same time, the panel required the district court to amend its opinion to correct certain mistakes of law; the panel made clear that the agency's legal duty was not to perform specific tasks enumerated by the district court, even if those tasks were related to the ultimate duty to perform an accounting. Id. at 1106. The Court explained that "defendants should be afforded sufficient discretion in determining the precise route they take." Id.

Pursuant to the district court's December 1999 ruling, DOI began submitting quarterly reports regarding virtually every aspect of trust fund management. These reports were the subject of extensive comment by the "Court Monitor," a position

established by the district court. Based on the DOI reports, and the Court Monitor's comments on them, plaintiffs filed motions for orders to show cause why the Secretary of the Interior, the Assistant Secretary for Indian Affairs, and more than three dozen of their employees and counsel, should not be held in contempt. In November and December 2001, the district court issued show-cause orders why the Secretary and Assistant Secretary should not be held in contempt in five specific respects, and proceeded to hold a month-long trial on the specified contempt charges.

b. On September 17, 2002, the district court issued a 265-page memorandum opinion, ordering various forms of relief and holding the Secretary and Assistant Secretary in civil contempt. See Attached "Orders On Appeal," Tab A. The court concluded that the relief previously entered in its earlier declaratory judgment was insufficient, 9/17/02 Op. at 240, simultaneously making it clear that the declaratory judgment should be treated as having the force of an injunction that "clearly directed" the Department "to perform an accounting of the IIM trust accounts so that the Phase II trial could proceed." Id. at 186-87.

Although the court had conducted a trial on the issue of contempt and captioned its order accordingly, neither the court's conclusions nor the relief ordered were limited to a ruling of contempt. The court emphasized that its modification of its earlier judgment did not depend on the alleged misconduct that

formed the basis for its contempt sanctions, which were the only issues presented at trial:

[M]uch of the relief granted is not dependent on the Court's conclusion that the defendants committed several frauds on the Court. Rather, the Court has fashioned much of the relief granted today (such as future proceedings and the appointment of a special master) simply because of the current status of trust reform.

Id. at 218 (emphasis added).

The court concluded that "Secretary Norton and Assistant Secretary McCaleb can now rightfully take their place * * * in the pantheon of unfit trustee-delegates." Id. at 265. Based on its conclusion that the officials responsible for the accounting program were unfit to perform their duties, the court formalized a broad agenda for trust reform to be supervised by the court in an elaborate sequence of future proceedings. The court directed the Secretary to submit two plans to the court to be evaluated in an ongoing supervisory process that would include "further injunctive relief to make the defendants correct the breaches of trust declared by the Court and stipulated to by the defendants back in 1999." Id. at 239-40.

Under the court's ruling, the Secretary's plans will be evaluated in a "Phase 1.5" trial that will "encompass additional remedies with respect to the fixing the system portion of the case, and approving an approach to conducting a historical accounting of the IIM trust accounts." Id. at 242. The district court ordered DOI "to file with the Court and serve upon the

plaintiffs" two plans by January 6, 2003. Id. The first plan is "for conducting a historical accounting of the IIM trust accounts" and the second a general plan "for bringing [the defendants] into compliance with the fiduciary obligations that they owe to the IIM trust beneficiaries." Id. at 242-43.

In addition, the court offered plaintiffs an opportunity "to file any plan or plans of their own regarding the aforementioned matters," id. at 243, and allowed each party "to file a response to the plan or plans of the other party," id. The court explained that because it "will not simply remand the matter back to the agency again as it did in December of 1999, it is not only appropriate but necessary for the plaintiffs to be heard on these matters at this time." Id. at 249.

The court also issued two additional orders related to its grant of relief. To assist in its extended control over trust fund management, the court elevated the court monitor to the position of "Special Master-Monitor" with judicial as well as monitoring responsibilities, even though this individual, as court monitor, has acquired significant personal knowledge of the matter based on extensive ex parte contacts with both the parties and the court. See Attached "Orders on Appeal," Tab B. The court also denied the government's motion to vacate the monitor's appointment. Id., Tab C.

2. As set forth in detail in our opening brief filed together with this motion, the court's ruling of September 17,

2002, although styled an order of contempt, has the effect of an injunction and modifies a previous order that the district court has now held to have the effect of a mandatory injunction. See Br. 24-27. The district court has declared the Secretary of the Interior "unfit" to perform her responsibilities, 9/17/02 Op. at 265, has instituted procedures that formalize its control over all aspects of the management of Individual Indian Money trust accounts, and has advised the Secretary that she should resign if she believes that she cannot properly discharge her statutory functions under the terms of the court's order. Id. at 215. That order, along with the additional orders issued on the same date, is properly appealable as of right. See Br. 24-27. As reiterated in our opposition to plaintiff's pending motion to dismiss the appeal, the court's rulings may properly be reviewed, in the alternative, under this Court's mandamus powers, 28 U.S.C. § 1651.

As our opening brief also demonstrates, the court's orders are fundamentally flawed. The court's rulings on fraud and contempt cannot support the relief issued and are, in any event, without basis. Even if the district court had held a trial that fairly evaluated whether agency action has been unreasonably delayed since the time of its prior judgment and this Court's decision, its assumption of responsibility would far exceed the proper scope of judicial authority over an Executive agency. See Br. 27-47. A court may not - consistent with the constitutional

allocation of powers - conclude that a Cabinet Officer is "unfit" to perform her duties and subordinate an agency's performance of its responsibilities to an ongoing system of judicial management that approximates a receivership. It is for the President, and not a court, to evaluate the fitness of a Cabinet Officer, and it is for the executive branch, and not a court, to carry out the tasks for which it is statutorily responsible and politically accountable. See id.

In affirming the district court's declaratory judgment, this Court admonished the court to be mindful of the limits of its jurisdiction. 240 F.3d at 1109-10. The district court has failed to heed this Court's guidance or settled limitations on the scope of judicial review of federal agency action. On the basis of a trial addressing five discrete specifications of contempt, the court has assumed control not only over the performance of an accounting, the only issue properly before the court, but of all aspects of "trust reform." The court's ruling is not a directive to the agency to perform its responsibilities, but an assumption of those responsibilities based on a conclusion that agency officials are "unfit." 9/17/02 Op. at 265. Thus, the Secretary is required to submit a plan not only for performance of an accounting, but also a separate plan regarding fiduciary obligations generally. The Secretary's plans are to be treated as no more than proposals. Plaintiffs, who have been granted wide-ranging discovery, will submit their own plan, and

the district court will consider both plans, and comments by the parties on each other's plans, before ordering further relief. As the court has made clear, under no circumstances will it remand the case to the agency. And if the Secretary finds that she cannot properly discharge her statutory functions under the terms of the court's order, she is invited to resign "forthwith." 9/17/02 Op. at 215.

3. Expedition of this appeal is plainly warranted. The district court has embarked on a course of action pursuant to which it, and not the responsible and politically accountable Executive Branch cabinet officer, will chart the course for Indian trust fund management. The court has branded the Secretary of the Interior as "unfit" to discharge her statutory responsibilities, and on that basis has arrogated to itself the authority that properly lies with the Executive agency. 9/17/02 Op. at 265. And the court, in addition, has elevated to a judicial role in this litigation an individual who, as court monitor, has acquired significant personal knowledge of the matter based on extensive ex parte contacts with both the parties and the court. See Br. 53-58. Under these circumstances, expedited review is necessary and appropriate to ensure that the mechanisms of justice do not run awry. As noted, in order that this appeal may proceed as promptly as practicable, we are filing our opening brief simultaneously with this motion.

CONCLUSION

For the foregoing reasons, this Court should grant this motion to expedite review of the above-captioned appeal. Specifically, we ask that a schedule be set requiring (1) that the brief for appellees be filed within an appropriate time; (2) that the government's reply brief be filed within 14 days after appellees' brief; and (3) that oral argument be held at the Court's earliest convenience following the completion of briefing.

Respectfully submitted,

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DECEMBER 2002

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of December, 2002, I am causing copies of the foregoing motion to be sent to the Court and to be served on the following by hand delivery:


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