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

ELOUISE PEPION COBELL, et al., Plaintiffs,	)	
v.	)	No. 08-8011 & No. 08-8013
DIRK KEMPTHORNE, Secretary of the Interior, et al., Defendants.	)	Civ. No. 96-1285 (D.D.C.) (JR)

DEFENDANTS' REPLY IN SUPPORT OF PETITION FOR LEAVE TO TAKE INTERLOCUTORY APPEAL

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The district court has certified for interlocutory appeal an order declaring, on the basis of its January and August 2008 opinions, that the class as a whole is entitled to $455.6 million. Plaintiffs' petition argues that this dollar amount is too low. Our petition explains that the award should be vacated in light of fundamental errors in the opinions on which the award is based.

Plaintiffs argue that this Court should accept their petition yet deny our petition. That argument makes no sense. This Court cannot decide whether the award is too low without considering the antecedent question of whether the award has any basis. United States v. Philip Morris USA Inc., 396 F.3d 1190, 1193-97 (D.C. Cir. 2005). Indeed, if the award is vacated, plaintiffs' arguments will be moot.

I. The Monetary Award Rests On Multiple Legal Errors.

A. The award of monetary relief is premised, in crucial part, on the district court's conclusion that the 1994 Act imposes multi-billion dollar accounting obligations that Congress has no intention to fund. Based on this perceived gap between congressional command and congressional appropriations, the court declared that the accounting obligations are "impossible" to perform and then proceeded to devise what it believed would be an appropriate remedy for the failure to perform an impossible task.

The court determined that the accounting is "impossible" by adopting many of the same parameters set out in two previous injunctions that were vacated by this

Court. In attempting to defend those parameters, plaintiffs echo the reasoning of the opinions on which the injunctions were based, and argue that such "vacated holdings, in the absence of contrary authority, remain persuasive precedent." Opp. 9-10 n.6. In vacating the injunctions, however, this Court provided "contrary authority," which plaintiffs do not discuss.

In vacating the accounting injunction for a second time, this Court held that the district court had "abused its discretion" by imposing obligations that would cost billions of dollars to implement. 428 F.3d 1070, 1077 (D.C. Cir. 2005). This Court stressed that the "general language" of the 1994 Act "doesn't support the inherently implausible inference that [Congress] intended to order the best imaginable accounting without regard to cost." Id. at 1075. "Congress was, after all, mandating an activity to be funded entirely at the taxpayers' expense." Ibid.

That decision left no room for the district court to reinstate accounting obligations that would cost billions of dollars. The ruling would constitute reversible error even if it is assumed – as plaintiffs assert – that Interior's judgments about "the scope" of the government's accounting obligations are not owed "any deference." Opp. 8 (plaintiffs' emphases).

But plaintiffs are clearly wrong to assert that Interior's judgments about the scope of the accounting obligations are owed no deference. As this Court explained,

the text of the 1994 Act "offers little help in defining the accounting's scope" and "the common law of trusts doesn't offer a clear path for resolving statutory ambiguities." 428 F.3d at 1074. "Thus neither congressional language nor common law trust principles (once translated to this context) establish a definitive balance between exactitude and cost." Id. at 1076. "This being so, the district court owed substantial deference to Interior's plan. The choices at issue required both subject-matter expertise and judgment about the allocation of scarce resources, classic reasons for deference to administrators." Ibid. (emphases added). Thus, the district court "erroneously displaced Interior as the actor with primary responsibility for 'work[ing] out compliance with the broad statutory mandate.'" Ibid. (quoting Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55, 124 (2004)).

As discussed in our petition, the court's "impossibility" ruling is linked to its fundamental misunderstanding of the judicial role in reviewing a claim that agency action is "unreasonably delayed" within the meaning of 5 U.S.C. § 706(a)(1). In Mashpee Wampanoag Tribal Council, Inc. v. Norton, 336 F.3d 1094 (D.C. Cir. 2003) – which plaintiffs do not discuss – this Court characterized Interior's pace in processing petitions for tribal recognition as "glacial," ibid., but explained that the delay was "attributable, at least in part, to a shortage of resources addressed to an extremely complex and labor-intensive task." Id. at 1100. This Court stated that the

"problem stemmed from a lack of resources" and was thus "'a problem for the political branches to work out.'" Id. at 1101 (quoting In re Barr Laboratories, 930 F.2d 72, 75 (D.C. Cir. 1991)). It stressed that "'[t]he agency is in a unique – and authoritative – position to view its projects as a whole, estimate the prospects for each, and allocate its resources in the optimal way. Such budget flexibility as Congress has allowed the agency is not for us to hijack.'" Ibid. (quoting Barr Laboratories, 930 F.2d at 76).

The conclusion in Mashpee that the district court had "misapplied the law of agency delay," id. at 1097, is equally applicable here. The choices involved in defining the scope of the accounting project necessarily require "judgment about the allocation of scarce resources." 428 F.3d at 1076. The issue before the district court was whether Interior was pursuing its obligations under the 1994 Act consistent with the resources that Congress has actually provided. Absent evidence of unreasonable delay in that process, there is no basis for an order compelling relief of any kind.[1]

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[1] Plaintiffs argue that missing records, as well as inadequate appropriations, would make it impossible to perform an accounting project on the scale defined by the district court. Opp. 12-16. The district court, however, recognized that Interior has "located and centralized 43 miles of Indian records potentially relevant to the accounting," 532 F. Supp. 2d at 45 (emphasis added), and it expressly declined to "reach the conclusion urged by plaintiffs: that an adequate accounting is impossible because of the problem of missing records," finding the record inconclusive on that point. Id. at 103 n.21.

B. The actual remedy chosen by the district court would be independently reversible even if the "impossibility" ruling were not fundamentally flawed. If the accounting obligations imposed by Congress were impossible to implement, it was not for the court to devise an alternative monetary remedy.

Plaintiffs argue that in an APA action, they may seek "the very thing to which they are entitled." Opp. 18 (quoting Department of the Army v. Blue Fox, Inc., 525 U.S. 255, 262 (1999) (quoting Bowen v. Massachusetts, 487 U.S. 879, 895 (1988)). But the "thing to which they are entitled" is the production of account statements in accordance with the 1994 Act. The district court recognized that it could not order monetary relief that is "a substitute for the accounting itself." 2008 WL 3155157 at *17. But that is exactly what the court did, by declaring the accounting obligations impossible and then using that ruling as the basis for a monetary award.

Plaintiffs argue that "an action in equity to enforce statutory duties" may be brought under the APA. Opp. 17 (quotation marks and citation omitted). But they cite no statute – and there is none – that mandates the monetary payment ordered by the district court. The 1994 Act does not mandate or even permit such an award of money. To the contrary, section 102(a) – the provision principally at issue in this suit – provides only that "[t]he Secretary shall account for the daily and annual balance of all funds held in trust by the United States for the benefit of an Indian tribe or an

individual Indian which are deposited or invested pursuant to the Act of June 24, 1938 (25 U.S.C. 162a)." It thus is irrelevant that a district court may order payment of money in "a suit seeking to enforce [a] statutory mandate itself, which happens to be one for the payment of money," Blue Fox, 525 U.S. at 262 (quoting Bowen, 487 U.S. at 900), because the 1994 Act does not provide such a mandate.

Moreover, even if section 102(a) could be alchemized into a mandate to pay money, the district court's award would not provide any class member with "the very thing that plaintiffs are entitled to receive." Opp. 20. As the district court recognized, there is "essentially no direct evidence of funds in the government's coffers that belonged in plaintiffs' accounts." 2008 WL 3155157 at *14. In other words, no plaintiff has identified any money that he or she is entitled to receive. Even at an "aggregate" level, the $455.6 million award does not rest on any evidence of an actual failure to pay any money owed. The government's statistical analysis did not establish a failure to pay; it addressed uncertainty associated with missing data, placing a range of dollar values on transactions that could not be documented without additional accounting work. The district court recognized this distinction; that is why it declared that it was "[c]rediting all the uncertainty to the plaintiffs." Id. at *14. The court lost sight of this distinction, however, when it treated the statistical analysis as if it were evidence of a failure to pay.

C. Because the award is not "restitution" in any generally accepted sense, there is also no permissible way that it could be distributed among the class members. As the district court acknowledged, it has "never resolved the class action questions that have been lurking around the edges of this matter." 8/28/08 Tr. 4-5.

The class was certified under Rule 23(b)(1)(A) & (b)(2) because class members had a common interest in compelling the production of historical account statements. But on the question of whether an account statement can be produced for any particular account, the interests and circumstances of class members diverge. Indeed, the district court recognized that certain types of accounts – the "judgment" and "per capita" accounts – are relatively easy to reconcile, and Interior already has reconciled a majority of those accounts. 532 F. Supp. 2d at 61. In declaring that it is "impossible" for the government to fulfill its accounting obligations, the court overlooked the basic distinctions among the account holders who comprise the class.

Just as class members have no common interest in the "impossibility" ruling, neither do they have a common interest in the monetary award. Plaintiffs would treat the class members' funds as a "single fund," Opp. 25, and distribute the monetary award on a "per capita basis." 4/28/08 Tr. 13. But class members are discrete individuals with distinct interests in separate accounts held over different periods of time. The funds in the accounts are derived from different sources of revenue, such

as individual trust lands (the land-based accounts), distributions of tribal litigation settlements (the judgment accounts), and distributions of tribal revenues (the per capita accounts). No interest is held in common for the class; neither the funds in the accounts or the underlying assets that generate revenue belong to the class as a whole. And as the district court recognized, some accounts receive only "a dollar and a quarter ... every few months," while others are "very substantial accounts" whose funds derive from assets that are "much less fractionated and much more intact." 4/28/08 Tr. 15. Given the differences of interest within the class, there is no authority to issue a monetary award on a class-wide basis.[2]

II. The Government's Appeal Will Materially Advance The Termination Of This Litigation.

Immediate consideration of the government's appeal will materially advance the termination of this litigation. The district court plans to conduct a "third proceeding" to decide how the monetary award will be distributed among class members. 2008 WL 3155157 at *28. As discussed above, the monetary award is premised on multiple legal errors and should be vacated. A third proceeding to

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[2] Plaintiffs urge this Court to disregard the letter submitted by class member Eddie Jacobs (Petition Exhibit 3) because the district court has declined to docket Mr. Jacobs' submissions. Opp. 26 n.27. But the court's failure to consider a class member's objection that "an accounting is not impossible for me" only confirms that the court has "never resolved the class action questions that have been lurking around the edges of this matter." 8/28/08 Tr. 4-5.

govern the distribution of that award will needlessly consume time and resources and place unwarranted burdens on class members seeking to protect their disparate interests.

The district court also plans to conduct further proceedings to address the government's ongoing historical accounting obligations, 8/28/08 Tr. 30, even though it declared that those obligations are "impossible" to perform and issued an alternative monetary remedy. As explained above, it was reversible error for the court to define the accounting obligations on a scale that would require billions of dollars to implement. Further proceedings premised on the court's erroneous view of the government's accounting obligations will only delay the termination of the litigation.

Respectfully submitted.

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October 6, 2008

CERTIFICATE OF SERVICE

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