[ORAL ARGUMENT NOT YET SCHEDULED]

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

ELOUISE PEPION COBELL, et al., Plaintiffs-Appellants, v. DIRK KEMPTHORNE, Secretary of the Interior, et al., Defendants-Appellees	No. 08-5500
ELOUISE PEPION COBELL, et al., Plaintiffs-Appellees, v. DIRK KEMPTHORNE, Secretary of the Interior, et al., Defendants-Appellants	No. 08-5506

RESPONSE TO MOTION FOR EXPEDITED APPEAL AND ARGUMENT; AND MOTION TO CONSOLIDATE APPEALS

Plaintiffs have moved for expedited briefing and argument in their appeal (No. 08-5500). The government does not oppose expedition, provided that it receives adequate time for briefing as set out below.

A. Plaintiffs in this class action are present and former holders of money accounts held in trust for the benefit of individual Indians. In 1994, Congress enacted legislation requiring the Department of the Interior to account for the balances in the accounts. In 2001, this Court held that Interior's performance of required historical accounting activities had been unreasonably delayed. 240 F.3d 1081, 1108 (D.C. Cir. 2001). In 2004 and 2005, this Court vacated injunctions that would have required accounting work on a massive scale, explaining 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." 428 F.3d 1070, 1075 (D.C. Cir. 2005).

The interlocutory appeals now before this Court arise out of two rulings issued in 2008. In January, the district court declared that the required accounting is an "impossible" task in light of what the court regarded as inadequate congressional appropriations. 532 F. Supp. 2d 37, 39 (D.D.C. 2008). The court accepted as correct many of the parameters of the vacated injunctions, although it recognized that an accounting on this scale would cost billions of dollars and that Congress would not provide such appropriations. Id. at 81, 102. Having defined the accounting on a scale that would never be funded, the district court concluded that the required accounting was thus "impossible" to perform. Id. at 102. The

court further reasoned that if the accounting was "impossible," it should devise "an appropriate remedy." Id. at 103.

The court decided to award "restitution" to the class based on a statistically possible but unproven "shortfall" between aggregate receipts and disbursements over the 121-year lifetime of the trusts. In August, the court declared that the class as a whole is entitled to a "restitution" award of $455.6 million. 569 F. Supp. 2d 223 (D.D.C. 2008). The court recognized that "there has been essentially no direct evidence of funds in the government's coffers that belonged in plaintiffs' accounts," id. at 238, and that "an accounting claim raised 121 years into the trust would ordinarily be prejudicially late," id. at 250, but believed that its approach was warranted by the 1994 Act, ibid.

On September 4, the district court issued an order declaring that the class is entitled to $455.6 million on the basis of the January and August opinions, and certified the order for interlocutory appeal under 28 U.S.C. § 1292(b). On September 9, plaintiffs filed a petition in this Court for leave to take an interlocutory appeal, urging that the dollar amount of the award was too low. See No. 08-8011. On September 18, the government filed a petition in this Court for leave to take an interlocutory appeal, explaining that the award should be vacated in light of errors in the opinions on which the award was based. See No. 08-8013.

On November 18, this Court granted both petitions. This Court subsequently docketed plaintiffs' interlocutory appeal as No. 08-5500, and docketed the government's interlocutory appeal as No. 08-5506. The appeals have not yet been consolidated.

B. The government has no objection to expedited review. To facilitate an orderly schedule and to permit adequate time for the preparation of briefs we respectfully propose the following actions.

1. We request that the Court consolidate plaintiffs' interlocutory appeal (No. 08-5500) with the government's interlocutory appeal (No. 08-5506) and establish a cross-appeal briefing schedule.

2. We request that the government be allotted 40 days from the date on which plaintiffs' opening brief is due in which to file its combined opening/response brief. This period is necessary to ensure adequate time to prepare our brief in consultation with other parts of the Department of Justice, the Department of the Interior, and the Department of the Treasury . For the same reason, we request that the government be allotted 20 days from the date on which plaintiffs' combined response/reply brief is due in which to file its reply brief.

3. We ask that the parties be granted leave to file separate appendices along with their principal briefs. The record is voluminous and it would be very difficult

to identify all appropriate joint appendix materials in advance of briefing. Separate appendices will avoid the delays attendant to the deferred appendix method.

4. We ask that any amici or intervenors be required to file briefs on the same day as the party they support.

Respectfully submitted.

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CERTIFICATE OF SERVICE

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