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

ELOUISE PEPION COBELL, et al.,	)	
Plaintiffs-Appellees,	)	
v.	)	No. 02-5374
GALE A. NORTON, Secretary of the Interior, et al.,	)	
Defendants-Appellants.	)	

OPPOSITION TO APPELLEES' MOTION TO DISMISS APPEAL

Defendants-appellants, the Secretary of the Interior, et al., respectfully respond to plaintiffs-appellees' motion to dismiss their appeal. Together with this opposition, we are filing our opening brief, which invokes this Court's jurisdiction under 28 U.S.C. § 1292(a), as well this Court's mandamus jurisdiction under 28 U.S.C. § 1651. We are also, at the same time, filing a motion to expedite appellate review.

As we show below, the court's ruling of September 17, 2002, although styled as 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. The district court has declared the Secretary of the Interior "unfit" to perform her statutory responsibilities as trustee for Individual Indian Money ("IIM") accounts, has instituted procedures that formalize the court's control over all aspects of the management of IIM accounts, and has advised the Secretary

that she should resign if she believes that she cannot properly discharge her functions under the terms of the court's order. That order, and two related orders regarding the use of a "Special Master-Monitor," are properly appealable as of right.

STATEMENT

The United States holds millions of acres of land in trust for individual Indians. Monies generated from the use of these lands and from other activities are collected and deposited by the United States in Individual Indian Money accounts until distributed to the beneficiaries. This case concerns ongoing efforts by the Department of the Interior ("DOI") to fulfill its statutory duty to provide plaintiffs an accurate accounting of the monies in these accounts.

1. 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. ("1994 Act"), requires 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, 58 (D.D.C. 1999). The court also held that the defendants had a statutory duty to establish written policies and procedures as follows: for collecting missing information necessary to render an accurate accounting; for the retention of trust documents necessary to render an accurate

accounting; for computer systems architecture necessary to render an accurate accounting; and for the staffing of trust management functions necessary to render an accurate accounting. Id.

Having found the agency in violation of applicable legal obligations, the court remanded the matter to allow DOI the opportunity to come into compliance. Id. at 58. The court also 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.

2. 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 Court required the district court to amend its opinion to correct certain mistakes of law. The Court made clear that the agency's legal duty was not to perform specific tasks enumerated by the district court, even if those tasks were clearly related to the ultimate duty to perform an accounting. The Court clarified that "the actual legal breach is the failure to provide an accounting, not [the] failure to take the discrete individual steps that would facilitate an accounting." Id. at 1106. Although the Court recognized that the government might be unable to cure its breach without doing many of the things ordered by the district court - for example, implementing a computer system, hiring staff, and creating

document retention policies - it directed the district court to amend its order to make clear that the defendants were not in fiduciary breach simply for failing to satisfy those specific requirements. Id. The Court explained that "defendants should be afforded sufficient discretion in determining the precise route they take." Id.

3. 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 created by the district court in April 2001 with the government's consent. The Court Monitor, Mr. Joseph S. Kieffer, III, was provided with offices at DOI and was permitted to engage in ex parte communications with DOI personnel.[1]

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, an Assistant Secretary, and more than three dozen of their employees and counsel, should not be held in contempt.

On November 28, 2001, the court issued a show cause order listing four "specifications" that focused on the defendants' alleged failure to initiate an historical accounting and their

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[1] Separate from the Court Monitor, the district court in this case also appointed a Special Master, Mr. Alan L. Balaran, with responsibility for supervising various discovery and other matters.

alleged failure to report properly on the operations of the Trust Assets and Accounting Management System ("TAAMS") computer system and the Bureau of Indian Affairs Data Cleanup Project. Dkt#1007. On December 6, 2001, the court issued a supplemental order requiring the defendants also to show cause why they should not be held in contempt for "[c]ommitting a fraud on the Court by making false and misleading representations starting in March, 2000, regarding computer security of IIM trust data." Dkt#1035.

The evidence at trial responded to the court's five discrete specifications. The specifications did not call for a general defense of the government's efforts to produce an accounting or a defense of its overall progress in managing trust matters. Accordingly, the evidence presented was primarily focused on the details of events that occurred in the past, not on the current state of affairs.

4. On September 17, 2002, the district court issued a 265-page memorandum opinion, ordering various forms of relief and holding the Secretary of the Interior and the Assistant Secretary of the Interior for Indian Affairs 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. Indeed, 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 statutory 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 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. Following the Phase 1.5 trial, "the Court plans on entering a structural injunction." Id. at 240 n.154.

The court declared that if Interior officials, "including Secretary Norton, feel that as a result of this Court's rulings

they are unable or unwilling to perform their duties to the best of their ability, then they should leave the Department forthwith or at least be reassigned so that they do not work on matters relating to the IIM trust." Id. at 215.

5. The court issued two additional orders related to its grant of relief. To assist in its extensive 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. See Attached "Orders on Appeal," Tab B. The court also denied the government's motion to vacate the Court Monitor's reappointment of April 2002. Id., Tab C.

ARGUMENT

A. It is axiomatic that, regardless of the manner in which a ruling is styled, an order having the practical effect of an injunction, and threatening serious, perhaps irreparable consequences, is immediately appealable under 28 U.S.C. § 1292(a)(1). See Carson v. American Brands, Inc., 450 U.S. 79, 84 (1981). As plaintiffs correctly note, an order of civil contempt against a party is not of itself generally appealable as a "final" order within the meaning of 28 U.S.C. § 1291. Byrd v. Reno, 180 F.3d 298 (D.C. Cir. 1999). It is equally clear, however, that "an injunction does not cease to be appealable under section 1292(a)(1) merely because it is contained in an order for civil contempt." International Assoc. of Machinists v.

Eastern Airlines, Co., 849 F.2d 1481, 1486 (D.C. Cir. 1988). The caption of the order does not determine its appealability.

B. The court's September 17, 2002 ruling is both an injunction and a modification of a declaratory judgment that the court has now held to be indistinguishable from a mandatory injunction. The court made clear that it regarded its prior judgment as inadequate, 9/17/02 Op. at 240, and that it was fashioning new relief that it explicitly declared to be based on a merits-determination regarding the "current status of trust reform," that was not dependent on its conclusions regarding fraud and contempt. Id. at 218.

That relief effects a fundamental reallocation of responsibilities for trust fund management between the executive branch and the court. The court did not merely require that the Secretary take "agency action" within the meaning of the APA (see 5 U.S.C. § 551(13)), on the premise that such action had been unreasonably delayed (see 5 U.S.C. § 706(1)), or even that the Secretary produce the agency action within a specified time frame. Instead, the court has concluded that a Cabinet Secretary is "unfit" to perform her statutory duties, 9/17/02 Op. at 265, thereby requiring that a court assume responsibility for the execution of those duties.

Although the court's ruling contemplates additional future injunctive orders, its present order has the immediate effect of

an injunction by both requiring action and implicitly enjoining the Secretary's future exercise of discretion.

Concluding that the Secretary could not be trusted to develop a final plan for judicial review, the court has adopted what it conceives as an alternative to a judicial receivership. In the "Phase 1.5 proceedings," the court has supplanted the Secretary as the official with ultimate responsibility for performing an accounting and, indeed, for a vast array of aspects of trust fund management. As an initial matter, DOI is required to file with the court, by January 6, 2003, "a plan for conducting a historical accounting of the IIM trust accounts" and "a plan for bringing themselves into compliance with the fiduciary obligations that they owe to the IIM trust beneficiaries." Id. at 242. In these plans, the defendants are required to "describe, in detail, the standards by which they intend to administer the IIM trust accounts, and how their proposed actions will bring them into compliance with those standards." Id. at 243. Plaintiffs may then "file any plan or plans of their own," and each party will have an "opportunity to file a response to the plan or plans of the other party." Id.

The injunctive component of the court's order is not limited to the requirement that the Secretary file plans with the court. The filing of the reports initiates a process that relegates the Secretary to the role of a commenter, not a decisionmaker, in an area for which she - and not the court - is statutorily

responsible and politically accountable. The agency's plans are to be treated merely as proposals. They will be evaluated along with a plan from plaintiffs and considered in light of further input from the Special Master and the Special Master-Monitor. As the court has made clear, it intends to retain control of all matters related to an accounting and "will not simply remand the matter back to the agency." Id. at 249. In short, having concluded at the end of a contempt trial that the "the general status of trust reform" is unacceptable and the Secretary is unfit, the court has assumed responsibility for directing the scope and means for performing an accounting and has assumed day-to-day responsibility for the operation of all aspects of trust reform to a far greater extent than even existed during the last two years. If the Secretary has difficulty in accepting the terms of the order, she is invited to resign "forthwith." Id. at 215.

When a court declares a Cabinet officer unfit, and presents her with the alternative of accepting wholesale judicial control or resigning, that order is properly appealable as an injunction under 28 U.S.C. § 1292(a)(1). Moreover, the court has not only told the Secretary what she must do; in addition, by assuming control over the future course of trust reform generally and requiring the Secretary to submit her proposed course of conduct to prior review and approval by the court, the court has implicitly told the Secretary what she cannot do in the exercise

of the authority and discretion that are vested directly in her by Acts of Congress. Were the Secretary to publish and implement a plan for an accounting independent of the court, its Special Master, its Special Master-Monitor, and plaintiffs' competing plans, the government would plainly risk new accusations of contempt. The effect of the court's order is to deprive the Secretary of authority and discretion to carry out her statutory responsibilities while requiring her cooperation in ongoing court direction of all aspects of trust fund management.

Indeed, inasmuch as the district court has now held that its 1999 declaratory judgment should be treated as a mandatory injunction, its order not only has independent injunctive force, but is also appealable as a modification of that injunction. See International Assoc. of Machinists, 849 F.2d at 1486.[2]

The extent of that modification is significant. In affirming the court's earlier declaratory judgment, this Court explained that the judicially enforceable duty at issue in this suit arises from "the failure to provide an accounting, not [the] failure to take the discrete individual steps that would facilitate an accounting." 240 F.3d at 1106. The Court explained that "defendants should be afforded sufficient discretion in determining the precise route they take." Id.

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[2] In the alternative, to the extent the court's order established a de facto judicial receivership, it is appealable as of right under 28 U.S.C. § 1292(a)(2).

Thus, while the Court affirmed the district court's decision to retain jurisdiction over the case for five years and to require periodic progress reports, 240 F.3d at 1109, it admonished the district court "to be mindful of the limits of its jurisdiction." Id. at 1110. The court's new ruling, in contrast, removes the Secretary's discretion. And, as we discuss in our brief, that ruling is based largely on deficiencies in progress reports on matters such as computer systems and security that, as this Court made clear, are not themselves the subject of a judicially enforceable duty. See, e.g., Br. 36, 44-45. Moreover, to the extent that the court considered the question of an asserted failure to initiate an accounting, it discounted significant steps taken by the present Administration shortly after it took office, such as the establishment of an Office of Historical Trust Accounting in July 2001, because that action occurred eighteen months after the court's original declaratory judgment. 9/17/02 Op. at 183; see Br. 19-20, 38.

Indeed, the order would be appealable even if viewed narrowly as establishing a monitoring scheme. See, e.g., Dunn v. New York State Dep't of Labor, 47 F.3d 485, 488 (2d Cir. 1995) (court has appellate jurisdiction to review a monitoring scheme ordered by district court); Avery v. Secretary of Health and Human Servs., 762 F.2d 158, 160-61 (1st Cir. 1985) (noting that orders requiring notice to class members and establishing

applicable procedures were equivalent to an injunction); Nguyen Da Yen v. Kissinger, 528 F.2d 1194, 1199 n.4 (9th Cir. 1975).

C. The court's order elevating the Court Monitor to the judicial role of Special Master-Monitor formed an integral part of the relief the court believed appropriate. As we show in our brief, the Court Monitor, who has acquired personal knowledge based on extensive ex parte contacts, and has announced strong opinions regarding the defendants' conduct, cannot now be made a judicial officer. While a challenge to the appointment of a Special Master-Monitor would not of itself usually be subject to immediate appeal, the order in this case is integral to the broader order of relief.

Similarly, as explained in our brief (see Br. 53-58), the government gave only a conditional consent to the April 2002 reappointment of the Court Monitor which the district court rejected, and the district court has no authority to require an agency to accept a "Court Monitor" with far-ranging investigative powers and to require it to pay for its services. To the extent that the court has ordered the government to accept such a monitor on an ongoing basis, that order plainly has the effect of an injunction.

D. An order of civil contempt against a party in ongoing litigation,[3] and an order appointing a Special Master, are not by

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[3] Although the court has imposed civil and not criminal sanctions, the relief in this case is not designed to secure (continued...)

themselves immediately appealable. Here, however, the orders form an integral part of the court's overall relief. As noted above, we have, in the alternative, invoked this Court's jurisdiction under the All Writs Act, 28 U.S.C. § 1651. Orders of civil contempt and orders appointing a Special Master are both properly reviewed under this Court's mandamus jurisdiction. See Byrd v. Reno, 180 F.3d 298 (D.C. Cir. 1999) (civil contempt order may be reviewable under Court's mandamus jurisdiction); In re Department of Defense, 848 F.2d 232 (D.C. Cir. 1988) (order appointing Special Master may be reviewable under Court's mandamus authority). When a district court concludes that a sitting Cabinet Secretary is unfit to execute her statutory responsibilities, there can be little doubt that this Court should exercise its supervisory jurisdiction to ensure that this extraordinary and significant conclusion is not based on error. Similarly, when a court appoints as a judicial officer a person who has had extensive ex parte contacts with both the parties and the district court, and has formed strongly expressed opinions about the case, this Court should ensure that the mechanisms of

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[3](...continued)
compliance with a specific court order as was the case in Byrd v. Reno. The court's order is based, instead, on a retrospective judgment of past agency conduct. Inasmuch as the government has no "subsequent opportunity to reduce or avoid [monetary sanctions] through compliance," see International Union, United Mine Workers of America v. Bagwell, 512 U.S. 821, 829 (1994), the rationale for permitting immediate appeals from orders of criminal contempt is equally applicable here.

justice do not run awry. See In re: Edgar, 93 F.3d 256 (7th Cir. 1996).

Accordingly, if the Court believes that any part of this appeal is more appropriately reviewed pursuant to its mandamus authority, we ask that it review our arguments on that basis.

CONCLUSION

For the foregoing reasons, this Court should deny appellees' motion to dismiss the appeal. To the extent that the Court concludes that any part of the appeal does not present an appeal as of right, the Court should, in the alternative, exercise its jurisdiction under the All Writs Act.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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