

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

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FOR DISTRICT OF COLUMBIA CIRCUIT

MAR 9 1 2005

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No. 05-5068

ELOUISE PEPION COBELL, et al.,
Plaintiffs-Appellees,

v.

GALE A. NORTON, SECRETARY OF THE INTERIOR, et al.,
Defendants-Appellants,

REPLY IN SUPPORT OF PLAINTIFFS-APPELLEES'
MOTION TO REMAND

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Trustee-Delegates have offered no reason why this case should not be remanded to the district court for it to resolve the substantial and unaddressed issue of impossibility.¹

Nowhere do Trustee-Delegates contest (nor could they) that, as shown in our prior brief, impossibility is a material and antecedent issue to entry and enforcement of an equitable decree. Nor do they contest (nor could they) that, as we previously demonstrated, the district court did not decide or even advert to any question of impossibility in re-entering the provisions of the structural injunction that Trustee-Delegates now seek to have this Court review. In this situation, the appropriate course is to send the case back to the district court for it to consider and resolve – including the development of a suitable and current factual record and the entry of relevant findings of fact and conclusions of law – the threshold issue of impossibility in the first instance. And of course, if the district court determines that implementation of the structural injunction is impossible, this Court would not need to reach the merits of the propriety of the injunction.

Moreover, the relevant circumstances have significantly changed since the district court first entered the structural injunction in September 2003. At that time, as Trustee-Delegates emphasize and as we acknowledged in our earlier filing with this Court, the district court adopted the approach of the structural injunction notwithstanding Plaintiff-Beneficiaries' contention that it would be impossible to implement to produce an adequate historical accounting. At that time, and without Trustee-Delegates' subsequent record of continued delay and non-compliance, the court might have felt duty-bound under *Cobell VI* to give Trustee-Delegates still one more chance to conduct an adequate historical accounting – a rationale that, whatever weight it might then have carried, has long since ceased to have any plausible force.

¹ Trustee-Delegates are simply wrong that we have advanced incompatible arguments in this Court. Our position clearly was, and remains, in the alternative: the Court should remand the case to the district court and therefore need not confront the issue of a stay pending appeal; but, if the case is not remanded, a stay should be denied.

But entirely beyond that, Trustee-Delegates themselves now have changed their position: in contrast to their previous submission, they now effectively concede, in agreement with Plaintiff-Beneficiaries, that compliance with the structural injunction is impossible. In particular, in their stay motion in this Court and in the supporting Cason Declaration, Trustee-Delegates represent that such compliance would be "impracticable, if not impossible," and would cost \$12-13 billion "and maybe significantly more." *See* Plaintiffs-Appellees' Combined Response at 10. The district court *never* has considered the question of impossibility in light of Trustee-Delegates' present position in this Court.

Furthermore, a remand to the district court will advance rather than postpone the ultimate provision of an adequate historical accounting. If, as Plaintiff-Beneficiaries and Trustee-Delegates now submit, compliance with the structural injunction is impossible, the district court can expeditiously come to that conclusion. In that event, the district court and the parties can promptly get on with the task of developing an adequate alternative approach; this Court would have no occasion to face the question of the validity of the injunction, and no delay would occur as the result of a needless appeal. Conversely, if the court below concludes, contrary to the parties' submission, that impossibility is not an obstacle to entry and enforcement of the structural injunction, it can render that judgment equally quickly – and then Trustee-Delegates can appeal the injunction to this Court at the point where the district court has made the requisite underlying determinations and this Court is confronted with the unavoidable necessity to pass upon the structural injunction.

In lieu of this sensible and efficient procedure of a remand, Trustee-Delegates insist on pressing their appeal and, on that basis, their request for a stay pending the appeal. For the reasons discussed above, that approach is pointless and wasteful. What is more, it ensures, even

if the appeal is expedited, that there will be still more delay before Trustee-Delegates will be compelled to honor their well-established and long-violated fiduciary duty to provide an adequate historical accounting. During that period, Trustee-Delegates will be under *no* enforceable obligation to take *any* steps toward an adequate historical accounting. Significantly, during that time, Plaintiff-Beneficiaries will continue to suffer still more irreparable injury as trust beneficiaries pass on, necessary governmental and third-party records are lost or destroyed, and time and money appropriated by Congress will be further squandered as Trustee-Delegates continue futilely to pursue their self-defined conception of an "accounting" that is doomed to be inadequate. In light of these considerations, Trustee-Delegates' professed concern about Plaintiff-Beneficiaries rings hollow indeed.

That there is no legitimate need for this appeal to proceed, instead of remanding the case to the district court for further proceedings, is reinforced by Trustee-Delegates' stubborn refusal to heed the prior rulings of this Court in *Cobell VI*, *Cobell XII*, and *Cobell XIII*. In light of Trustee-Delegates' constant repetition of discredited positions, former President Ronald Reagan's words are apt here: "There they go again." Among the more conspicuous are the following:

- Trustee-Delegates persist in their fundamental misconception that the 1994 Reform Act creates and defines their fiduciary duties, even though that position has been squarely rejected by this Court's decisions that these duties long pre-existed the 1994 Act.
- Trustee-Delegates continue to deny, contrary to this Court's decisions, that the duty to provide an historical accounting is grounded in the statutes and treaties giving rise to the trust relationship; that there are enforceable subsidiary obligations incident to that duty to account; and that their trust responsibilities, while derived from statutes and treaties and not from the common law itself, are informed and given content by established common-law trust principles.
- Trustee-Delegates renew their view, repeatedly rejected by this Court, that the case is nothing more than an APA suit and is strictly governed by APA rules without regard to trust considerations or the broad remedial authority of a court of equity.

- Trustee-Delegates wholly disregard the district court's well-reasoned explanation why their putative "accounting" would necessarily and unavoidably fail to produce an adequate historical accounting in manifold respects, *e.g.*, (1) the duty to account for all funds rather than only some funds depending on when the funds were deposited, whether the original account holder now is deceased, or whether the account currently remains open; and (2) the need to collect and protect governmental and third-party data relevant to the historical accounting without further delay especially because Trustee-Delegates' continued inaction would exacerbate the substantial risk of the loss of critical data.
- Trustee-Delegates engage in the fiction that the 2004 "Midnight Rider" remains in effect and controls this appeal, when in fact the Rider has long since expired by its own terms; and, notably, Congress has refused Trustee-Delegates' entreaties to enact a new statute that would apply here.
- Trustee-Delegates simply assert, without specific proof or quantification, that they will be injured *pendente lite* by the submission of the required plans if the appeal goes forward and the stay is denied, while at the same time blindly ignoring the indisputable irreparable injury to Plaintiff-Beneficiaries that both this Court and the district court have repeatedly recognized would result from continued delay.

In sum, a remand to the district court is fully warranted here and is far preferable to Trustee-Delegates' demand to proceed with an appeal that is both unnecessary and dilatory.

CONCLUSION


For the foregoing reasons and those stated in our previous submission, the case should be remanded to the district court for further proceedings on the issue of impossibility.

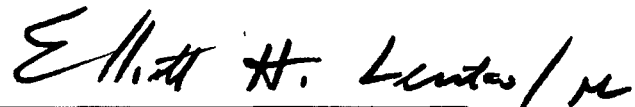
Dated: March 31, 2005


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Reply in Support of Plaintiffs-Appellees' Motion to Remand* was served on the following on March 31, 2005:

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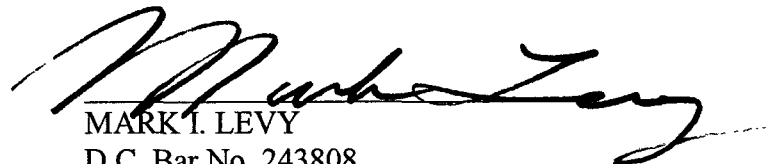
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