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 PLAINTIFFS-APPELLEES' MOTION TO STRIKE

Defendants-appellants, the Secretary of the Interior, et al., respectfully respond to plaintiffs-appellees' motion to strike their opening brief.

1. Plaintiffs argue that the brief was untimely because it was filed together with a motion to expedite before the Court had set a briefing schedule. Contrary to plaintiffs' understanding, parties may seek expedition by motion and are not barred from attaching their opening brief together with their motion in an effort to obtain timely review. The Court, of course, retains discretion as to the timing of future filings and its own consideration of the case. However, a motion for expedition that attaches an opening brief is not "untimely" and does not "ignore orders of the Court." Pl. Mot. at 2.

2. The government has invoked this Court's appellate jurisdiction and has explained why this case may be heard as of right in its response to plaintiffs' motion to dismiss our

appeal. As we explained in that response, and in our brief, jurisdiction would, in the alternative, be available under 28 U.S.C. § 1651.

In their present motion, plaintiffs appear to urge that the Court cannot exercise its mandamus jurisdiction unless it also has jurisdiction under 28 U.S.C. § 1291 or 28 U.S.C. § 1292. Pl. Mot. at 3. As our response to plaintiffs' motion to dismiss demonstrates, that contention is baseless and, unsurprisingly, plaintiffs cite no authority for this position.

Plaintiffs next argue that this Court may not exercise its mandamus authority because the government invoked mandamus jurisdiction in its brief as an alternative basis of jurisdiction and has not filed a separate petition for a writ of mandamus. This Court has not elevated form over substance and, consistent with the practice of other circuits, has treated an appeal as a petition for mandamus when it determines that no appeal of right exists but that review is appropriate under 28 U.S.C. § 1651. See Ukiah Adventist Hospital v. FTC, 981 F.3d 543, 548 & n.6 (D.C. Cir. 1992) (citing Sierra Rutile Ltd. v. Katz, 937 F.3d 743, 749 (2d Cir. 1991); Beard v. Carrollton R.R., 893 F.3d 117, 120 (6th Cir. 1989)). Indeed, inasmuch as plaintiffs state in their response to our motion for expedition that expedition is "vital" to any issues that survive their motion to dismiss, Pl. Response at 2, any delay would be particularly inappropriate.

Finally, plaintiffs briefly suggest that the issues presented can properly be addressed on appeal from final judgment. As we show in our response to plaintiffs' motion to dismiss and in our brief, the district court's ruling has the effect of an injunction or a modification of an injunction and is appealable as of right. As we also explained, the Court should plainly exercise its supervisory jurisdiction to determine whether the district court's conclusion that a sitting Cabinet Secretary is unfit to execute her statutory responsibilities, and its consequent decision to assume responsibility for a broad range of trust matters, are 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 and publicly expressed opinions about the case, this Court should ensure that the mechanisms of justice do not run awry. See In re: Edgar, 93 F.3d 256 (7th Cir. 1996).

CONCLUSION

For the foregoing reasons, the Court should deny plaintiff-appellees Motion to Strike.

Respectfully submitted,

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DECEMBER 2002

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd 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:

The Honorable Royce C. Lamberth
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and to be served by fax upon:

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and to be served by regular mail upon:

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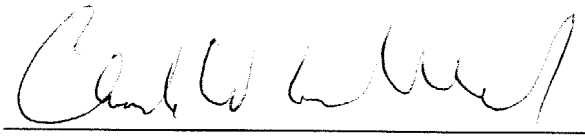

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