UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
ELOUISE PEPION COBELL, *et al.*,
Plaintiffs,
v.
DIRK KEMPTHORNE, Secretary of
the Interior, *et al.*,
Defendants.
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Civil Action No. 96-1285 (JR)
MEMORANDUM ORDER

The current posture of this case cannot be fully described in less than 40 or 50 pages, but the premises of this order can be recited in a half-dozen bullet points:

• In late 1999, in *Cobell V*, the defendants were found to be in breach of the duties assigned to them by the Indian Trust Fund Management Reform Act of 1994, including especially the duties to provide adequate systems for accounting for trust fund balances, provide periodic timely reconciliations to assure the accuracy of accounts, and provide account holders with periodic statements and balances. 25 U.S.C. § 162a(d); 25 U.S.C. § 4011. This court ordered the defendants to come into compliance with their obligations and to make quarterly reports of their progress.

• For seven years thereafter, the parties engaged in strenuous litigation over the government's compliance or noncompliance with that order, the appointment and activities of monitors and special masters, the configuration and security of DOI's information technology systems, the capabilities *vel non* of new software acquired or developed by DOI, and the details of injunctions issued by this court, among other things.

• After numerous decisions of this court and of the Court of Appeals – to and including *Cobell XIX* – the orders that remain in effect still require the government to produce an accounting for each IIM account, to make quarterly reports of its progress toward that goal, and to comply with a consent order regarding IT security.

• The Court of Appeals decision in *Cobell XVII* and Congress's failure to follow up on Pub.L.No. 108-018, 117 Stat. 1241 (2003), have left unresolved the details of the defendants' historic accounting obligations. Also unresolved is a subset of that issue – the question of whether statistical sampling will "satisfy fiduciary standards," *Cobell XVIII*, slip op. at 12.

• The government is continuing to make quarterly reports and continuing to pursue its IIM accounting agenda, collecting and indexing documents and producing historical statements of account (HSAs), which it proposes to send to IIM account holders, all as reported in quarterly status reports (e.g. No. 28, dated February 1, 2007 [3290]). The government is also preparing and will soon publish a new trust management plan.

• Plaintiffs oppose the government's request for approval of its plan to send HSAs to IIM account holders and demand a trial. At such a trial, plaintiffs suggest, the government would present its accounting, the plaintiffs would challenge (or approve) it, and equitable restitution would be awarded for any of the ca. $13 billion revenue collected for IIM accounts that cannot be accounted for. After three off-the-record meetings with counsel for the parties (two of which, by mutual consent, were *ex parte),* it is clear that the remaining issues in this case cannot be resolved without a "trial" -- or something like a trial, call it an evidentiary hearing if you like. More than seven years (and twenty-eight quarterly status reports) after *Cobell V,* it is both prudent and well within the supervisory powers of this court to review the accounting project in detail, and to do so in open court, where the government may present, and plaintiffs may test or challenge, the methodology and results of the accounting project up to the time of the hearing. The end product of such a proceeding would include the answers to at least the following questions:

• Have the defendants cured (or are they curing) the breaches of their fiduciary duty that were found in *Cobell V*?

• Do the defendants' HSAs i.e., satisfy defendants' duties "rooted in and outlined by the relevant statutes and treaties . . . [and] defined in traditional equitable terms"? *Cobell VI*, 240 F.3d at 1099.

• Have the defendants unreasonably delayed the completion of the required accounting?

• What further relief, if any, should be ordered?

The hearing will begin at 9:30 a.m. October 10, 2007, and continue as long as necessary. Witnesses will be tendered for cross-examination after presented written direct testimony. At some point during the hearing, or perhaps beforehand, a visit to the Lenexa project site is contemplated. A number of prehearing conferences will probably be necessary, to refine and perhaps amend the issues and to hear and resolve motions *in limine*. The first such conference will be held at 10 a.m. May 9, 2007. At that conference, the Court will also hear argument on the government's pending motion [3299] to vacate the consent order regarding IT security.

Two motions for sanctions were granted in February and March 2003, [1898] and [1772]; statements of fees and expenses were duly submitted in June and November 2004, [2596] and [2762]; but orders to pay were never issued. The dollar amounts of the statements have not been seriously contested. I have reviewed them and find them to be reasonable. The government must now pay to plaintiffs' counsel the sum of $519,565.64. The Court's order of January 16, 2007 [3283], to the extent it denied defendant's motion to quash certain deposition notices [3186] and defendant's motion for a protective order [3044], was entered in error, and (only to that extent) is vacated. Defendant's motions to quash certain deposition notices [3186] and for protective order [3044] are instead granted. Plaintiff's motions to compel, [3295] and [3296], are accordingly denied as moot.

It is SO ORDERED.

JAMES ROBERTSON
United States District Judge