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OVERVIEW AND IMPLICATIONS NOVEMBER 15, 2005 COURT OF APPEALS RULING IN THE *COBELL V. NORTON* LITIGATION

I. INTRODUCTION

On November 15, 2005, the U.S. Court of Appeals for the District of Columbia issued a ruling in the *Cobell v. Norton* class action lawsuit, striking the district court's structural injunction which ordered the historical accounting of Individual Indian Money (IIM) accounts. As background, the *Cobell* lawsuit was filed in 1996 and subsequently certified as a class action on behalf of present and past IIM account beneficiaries to compel the federal government to adhere to its trust duties owed to them.

One of the principle issues in the lawsuit is the government's compliance with its statutory duty set forth in the American Indian Trust Fund Management Reform Act of 1994 ("1994 Act") requiring a historical accounting of the IIM trust fund accounts. Although the litigation has produced a number of reported decisions on a host of jurisdictional, factual and legal issues, the November 15th ruling stems primarily from the historical accounting claim as required by the 1994 Act.

II. OVERVIEW OF NOVEMBER 15TH COURT OF APPEALS RULING

In court filings, the plaintiffs and government estimated the cost of the IIM historical accounting, as ordered by the district court's structural injunction, would be as much as \$13 billion and take up to 200 years to complete. The scope and projected time and cost of complying with the injunction has been a critical component of the plaintiff's legal and public relations strategy to compel a sizable settlement figure from the federal government. In vacating the IIM historical accounting order, many believe that the Court of Appeals' ruling dealt a major blow to the plaintiffs' case by determining that the federal government is not strictly bound by common law trust principles, and therefore, could appropriately weigh the cost of the accounting against its intended accuracy.

The Court of Appeals revisited its earlier rulings and determined that the IIM trust is different from private trusts. The Court was greatly persuaded by the fact that Congress, through the 1994 Act, mandated a historical accounting duty whose costs are to be paid by the taxpayers, and did not intend an unlimited scope without regard to the amount of cost to do the accounting. Thus, the Court then reasoned that the district

court was in error in ordering the structural injunction without considering the agency's input on the cost of the accounting.

In further considering the distinction between the IIM trust and private trusts, the Court of Appeals also revisited its earlier rulings which had rejected providing to the Department of the Interior deference on its decision making and interpretation of its duties. A court reviewing a federal agency's actions and decisions in an Administrative Procedures Act (APA) appeal case typically affords deference to the agency and will only overturn or disturb the action unless it is determined to be "arbitrary and capricious." Although the *Cobell* lawsuit was filed as an APA case in federal district court, an earlier 2003 Court of Appeals ruling found that the Department of the Interior was not entitled to that deference for a variety of reasons, including due to its past and ongoing mismanagement of the IIM trust.

However, while acknowledging its earlier rulings, in the November 15th ruling considered the exorbitant cost of the accounting, the failure of the district court to consider or credit the Department of the Interior for recent trust accounting reforms, and ruled that the district court improperly applied common law trust principles with respect to the government's historical accounting duty under the 1994 Act. Based on these considerations, the Court of Appeals ruled that the Department of the Interior's plan for conducting the IIM historical accounting is entitled to broad deference by the district court. Moreover, in interpreting the language of the 1994 Act, the Court of Appeals called into question the scope of the district court's "equitable" authority to order such a wide sweeping injunction. This aspect of the decision undercuts the plaintiffs reliance on the district court's broad equitable authority as the central basis to secure the ultimate result they desire - - the appointment of a private receiver to take over and fix the administration and management of the IIM accounts.

Finally, the ruling is considered to be a damaging set back to the plaintiffs' case because it specifically commented with approval on the government's proposed use of statistical sampling in conducting the IIM historical accounting. With the structural injunction vacated, the ruling sets the stage for the government to move forward with its historical accounting plan, and many believe it significantly diminishes the leverage the plaintiffs may have had to force a large monetary settlement.

Plaintiffs' representative John Echohawk, NARF Executive Director, addressed the January 19, 2005 ITMA membership meeting in Albuquerque and explained the plaintiff's view of the November 15th ruling. The plaintiffs believe this ruling is in direct conflict with the Court of Appeals own earlier ruling in 2003 with respect to (1) the application of common law trust principles, and (2) whether any deference is owed to the federal agency's decision making and interpretation of its statutory duties. Echohawk explained that the 2003 Court of Appeals' ruling addressed and settled these issues in favor of the plaintiffs, and under a "first in time" theory, the 2003 ruling trumps the November 15th ruling. Under this theory, Echohawk stated that the November 15th ruling simply "does not count." However, the plaintiffs did not appeal the November 15th ruling, but are working to get the issue back before the Court of Appeals for

resolution in their favor. This particular legal theory has not been examined by ITMA, but many attorneys believe it will be very difficult to prevail on due to the fact that the underlying decision was not appealed.

III. RELEVANT IMPLICATIONS

While this particular ruling applies specifically to the *Cobell* litigation and the structural injunction ordered by Judge Lamberth, it clearly has broader implications. Specifically, the November 15th decision provides the government a strong precedent to use in the tribal trust fund and other cases filed by Tribes. The decision also has implications on ITMA's tribal trust fund settlement project and our work in securing legislation to extend the statute of limitations with respect to the filing of *tribal* trust fund accounting claims, as well as on any legislative or regulatory efforts to enforce strict fiduciary standards with regard to Indian beneficiary trust accounting, and perhaps management reforms, by the federal government. During the January 19-20 meeting in Albuquerque, the ITMA tribal membership discussed these various implications and began charting a strategy to deal with them.