U.S. DISTRICT COURT
COLUMBIA
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MAYER-WHITTINGTON
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL et al.,	)	
Plaintiffs,	)	No. 1:96CV01285
v.	)	(Judge Lamberth)
GALE A. NORTON, Secretary of the Interior, et al.,	)	
Defendants.	)	

INTERIOR DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR ORDER DIRECTING DEFENDANTS TO RESCIND NOTICE SENT TO 1200 TRUST BENEFICIARIES

The Secretary of the Interior and the Assistant Secretary - Indian Affairs ("Interior Defendants," or "Interior") respectfully submit the following opposition to Plaintiffs' Motion for Order Directing Defendants to Rescind Notice Sent to 1,200 Juvenile Trust Beneficiaries ("Plaintiffs' Motion").

INTRODUCTION

Interior has completed approximately 14,235 historical statements of account for Individual Indian Money ("IIM") account holders. Interior has mailed 1,208 of these statements to the parent(s) or guardian of the account holders for whom they were prepared.[1] In a memorandum opinion and order dated December 23, 2002 ("Rule 23(d) Order"), the Court found that certain, identified language in the transmittal letter accompanying the statements, improperly purported to extinguish the rights of class member account holders who received these statements. Rule 23(d) Order at 9-10. As discussed in Interior's Motion for Reconsideration of

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1/ The statements were mailed in two batches, 560 on October 9, 2002, and 648 on October 28, 2002.

the Court's Rule 23(d) Order, and in Interior's Reply in support of that motion, nothing in the historical statements of account, or the accompanying transmittal letters, could, or did, extinguish any rights of a class member in this litigation. Plaintiffs have opposed Interior's Motion for Reconsideration, but agree with Interior that no class member rights were affected in connection with the historical statements of account. See Plaintiffs' Opposition to Interior's Motion for Reconsideration at 6 n.8 (filed January 23, 2003) .

Plaintiffs' Motion requests an order requiring Interior to communicate with all the account holders who have received their statements. Plaintiffs' proposed order contains seven specific items that Plaintiffs believe should be included in this new communication between Interior and the account holders who received statements. See Proposed Order. Interior opposes Plaintiffs' Motion as unnecessary given the parties' agreement that no class member rights were extinguished by Interior's prior communication. If the Court decides that further communication is needed, however, Interior believes that only some of the relief requested by Plaintiffs is appropriate. In any event, only class members should receive further communication on this issue.

I. THE FURTHER COMMUNICATION WITH CLASS MEMBERS REQUESTED BY PLAINTIFFS IS UNNECESSARY AND INAPPROPRIATE

If the Court, upon reconsideration of its Rule 23(d) Order, agrees with Interior (and Plaintiffs) that nothing in the notice previously sent to any class member, could, or did, extinguish any rights in this litigation, then any further communication with class members regarding the statements that they received is unnecessary. It would seem odd to inform someone that nothing happened to them.

If, however, the Court disagrees, and believes that further communication would be appropriate, Interior opposes some of the relief requested by Plaintiffs. Interior believes that, consistent with the Rule 23(d) Order, and any reconsideration of that order which may be forthcoming, it would be appropriate to inform any class member who received a historical statement of account: (1) that they are a member of this class action, and include an identification of the action and the court in which it is being litigated; (2) that they are represented by counsel, and include an identification of counsel by name, address and phone number, and citation to counsels' website; (3) that they received a historical statement of account and a letter accompanying that statement which informed them of their obligations if they wished to seek an administrative appeal of that statement; and (4) that failure to pursue an administrative appeal of the statement with Interior does not eliminate any rights that they have as class members in the Cobell class action.[2]

Interior's proposed communication is consistent with the Rule 23(d) Order. Plaintiffs, however, seek to go beyond the Rule 23(d) Order and want Interior to tell class members that the administrative appeal process adopted by Interior, and described in the transmittal letter, is inoperative. See Plaintiffs' Proposed Order. The Rule 23(d) Order did not invalidate the administrative obligation to challenge the historical statement of account received by the account holder. There is thus no authority for telling a class member that he or she need not administratively challenge it. Interior should not be required to tell class members something

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[2] The precise language for this suggested communication can be found in the proposed order attached to Interior's Motion for Authority to Communicate with Class Members Regarding the Historical Statements of Account, filed concurrently with this opposition to Plaintiffs' Motion.

that is untrue.

In addition, to the extent that Plaintiffs seek to attack the historical statements of account themselves, as opposed to the information provided to the account holders regarding their obligations with respect to an administrative appeal of the statements, Plaintiffs' requested relief is inconsistent with the Rule 23(d) Order.

II. ANY FURTHER COMMUNICATION MUST BE LIMITED TO CLASS MEMBERS

The bigger problem, however, with Plaintiffs' Motion is that they request a supplemental communication be sent to all of the account holders who received statements, rather than to those who were class members. The Court's February 4, 1997 class certification Order contains the current definition of class membership in this case. That Order certifies a plaintiff class "consisting of present and former beneficiaries of Individual Indian Money accounts." February 4, 1997 Order at 2-3. Plaintiffs have suggested that the word "present" in the February 4, 1997 Order should not be taken literally, but rather was intended to include future account holders. See Plaintiffs' Supplemental Reply in Support of Preliminary Injunction at 5 n.4 (filed December 2, 2002). Plaintiffs' interpretation of the February 4, 1997 Order defies both logic and the law.

Plaintiffs cited no authority for their novel proposition that "present" should somehow be interpreted to mean both current and future. In certifying a class, numerous courts in this circuit have used the word "future" when they intended to include "future" members within the class definition. See, e.g., Abbott v. Meese, 824 F.2d 1166, 1167 (D.C. Cir. 1987), vacated on other grounds, 490 U.S. 401 (1989); Samuels v. District of Columbia, 669 F. Supp. 1133, 1135 (D.D.C. 1987); Beeman v. Middendorf, 425 F. Supp. 713, 716 (D.D.C. 1977). The premiere

treatise on class actions has an extensive discussion of when it is appropriate to have future members included in a class definition, especially where prospective injunctive or declaratory relief is sought. See Newberg On Class Actions § 3.07; § 6.15; § 23.10 (3d ed. 1992); see also 6A Federal Procedure, Lawyers Edition, § 12:61, at 77 ("Often future class members are properly included within a class definition in order to ensure that injunctive relief won by the named plaintiffs runs in favor of the future members"); 5 Moore's Federal Practice, § 23.21[2], at 23-58 (3d ed. 1997) ("a class may include future members as long as the court would be able to determine, at any given time, whether a particular individual is then a member of the class").

In a concurring opinion, Judge Robinson suggested that it might be superfluous to include "future" members in a class definition at the time of class certification. See Council of & for the Blind of Delaware County Valley, Inc. v. Regan, 709 F.2d 1521, 1543 n.39 (D.C. Cir. 1983) ("Since the future class members who actually suffer injury thereby become present class members eligible for relief, a definition encompassing future members is superfluous.") Judge Robinson's discussion of this issue is limited to a few ambiguous words in a footnote of a concurring opinion, but it appears that Judge Robinson meant that since a judge retains the authority under Rule 23 to amend the class at any time during the litigation and, at the time of entry of judgment, is required under Rule 23(c)(3) to describe the class that is affected by the judgment, it is unnecessary at the time of certification to include "future" members in the class because they will be current members later, when the class is amended or described at the time of judgment, assuming they suffered injury and are otherwise "eligible" for class membership.

In any event, Judge Robinson's opinion in Council of & for the Blind is not controlling authority in the D.C. Circuit and does not support the notion that "present" means "future" in a

class certification order. To the contrary, as the cases cited above attest, judges have routinely used the word "future" when they intend to capture future members within the definition of a class. Indeed, this Court has done so on at least one occasion recently. See Lobue v. Christopher, 82 F.3d 1081, 1082 (D.C. Cir. 1996) (order certifying class of "all persons who presently are or in the future will be under threat of extradition" reversed, but not on the grounds that it was improper to include "future" members in a class).[3]

Of course, in most circumstances it may not be important whether the class certification order is intended to cover future members because, as mentioned, a court retains the authority to amend the class definition. See 2 Newberg on Class Actions § 6.28, § 7.12, § 7.47 (3d ed. 1992). A court also will – or should – describe the affected class at the time of judgment pursuant to Rule 23(c)(3).[4] The Court has not amended the class definition here. Indeed, unaccountably, the Court did not "include and describe those whom the court finds to be members of the class," Rule 23(c)(3), when it entered its judgment in 1999 after Phase I. The Court decided that "the precise scope of plaintiffs' certified class" was one of the "significant legal issues that remain matters for the second phase of this case." Cobell v. Babbitt, 91 F. Supp. 2d 1, 32 n.22 (D.D.C. 1999).

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[3] Class certification orders are often unpublished. Therefore, Interior does not know whether this Court routinely includes "future" members in its class certification orders. Interior is only noting that the Court has done so after Judge Robinson's opinion in Council of & for the Blind and thus presumably could have done so here if the Court intended to include future members within the class definition of the February 4, 1997 certification order.

[4] It should be noted that Interior treated all account holders the same, regardless of whether they were class members, in sending out the original historical statement of accounts. Interior did not try to limit the rights of account holders to receive an accounting merely because they were not class members.

The precise scope of the class is important now, since the Court has entered a Rule 23(d) order which, by its terms, is necessarily limited to communications with class members. Because the scope of the class has not been modified or amended by the Court, the current composition of the class is defined by the February 4, 1997 class certification Order. Under that Order, only account holders whose accounts were created on, or before, February 4, 1997 are members of the class.

As previously disclosed to the Court (see Interior's Supplemental Opposition to Plaintiffs' Motion for a Preliminary Injunction Regarding Historical Statements of Account at 5 n.4 (filed November 15, 2002)), all of the historical statements of account at issue here were related to judgment IIM accounts that had been created after February 4, 1997. Therefore, the account holders who received these statements could only be class members in this action if they had some other IIM account created before February 4, 1997.[5]

Interior previously informed the Court that it was investigating this issue. See Interior's Supplemental Opposition at 5 n.4. Interior's investigation is not yet complete. Interior can identify only one individual who received a historical statement of account who also had another IIM account created before February 4, 1997. See Declaration of Robert L. Brunner, at ¶ 13 (Attachment A). Interior is investigating an additional 73 accounts. Id.

Any further communication ordered by the Court related to the historical statements of account that have already been sent obviously must be limited to class members. At this time,

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[5] Even so, the prior communication was obviously only related to an account that did not confer class membership to the account holder.

any such further communication can only go to one individual, not all 1,208 account holders who received statements, as requested in Plaintiffs' Motion.

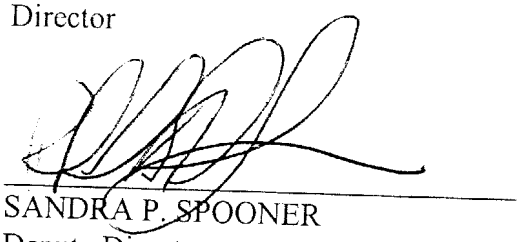
CONCLUSION

For these reasons, Plaintiffs' Motion should be denied, at least in large part.

Dated: February 6, 2003

Respectfully submitted,

ROBERT D. McCALLUM, JR.
Assistant Attorney General
STUART E. SCHIFFER
Deputy Assistant Attorney General
J. CHRISTOPHER KOHN
Director



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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
Plaintiffs	)	
v.	)	Case No. 1:96CV01285
GALE NORTON, Secretary of the Interior, et al.,	)	(Judge Lamberth)
Defendants.	)	

Declaration of Robert L. Brunner

I, Robert L. Brunner being duly sworn, state as follows:

1. I am a Principal in KPMG LLP's ("KPMG") Forensic practice in San Francisco, California and am the National Partner-in-Charge of KPMG's Class Action / Complex Data Services practice. I have Bachelor of Science degrees in mathematics, computer science and management science from the University of California at San Diego.

2. I specialize in complex, data-intensive cases including class actions, government investigations and bankruptcies. I have extensive experience in the design and implementation of complex financial, economic, transactional, and document / image management systems. I am an expert in the areas of transactional database design and management, complex data modeling, claims management and administration and document imaging systems.

3. Prior to joining KPMG in May 2002, I was a Partner in Andersen Worldwide ("Andersen"), where I led the Class Action Services and Complex Data Management practices for the firm and the Financial Advisory Services practice in the Pacific

Attachment A
Defs' Opposition to Pltfs' Motion to Rescind Notice to Trust Beneficiaries

Northwest. I led the development of Andersen's Electronic Data Discovery and Legal Information Consulting Practice methodologies.

4. I am a member of the American Records Management Association, Association of Information and Image Management, and the American Society for Information Science and Technology.

5. I have worked on a number of projects and disputes relating to trust administration and the fiduciary duties of trustees. These engagements have included a review of both corporate and private trust accounts in a commercial setting.

6. My team was engaged by Interior in 1999 to assist with the Paragraph 19 search and collection effort. Since the establishment of the Office of Historical Trust Accounting ("OHTA") in July 2001, we have assisted OHTA in developing a plan for historical accounting. Specifically, we were retained to provide support for the development and implementation of options for conducting a historical accounting of Individual Indian Money ("IIM") accounts.

7. My team has performed extensive analyses on the electronically available Integrated Records Management System ("IRMS") IIM data. We understand the nature and organization of the data, how various types of transactions have been recorded and can be traced in the data, and its relevance and potential usefulness to a historical accounting. As a result of these analyses, we are familiar with availability, limitations and nature of electronic data.

8. We were asked us to conduct a review of the White Mountain Apache judgment IIM accounts in the Phoenix Area that received Historical Statements of Account ("Statements") to determine if the holders of these accounts had any additional accounts that were open on or before February 4, 1997.

9. For this review, we utilized the IRMS data provided by OHTA from the Office of the Special Trustee for American Indians, Office of Trust Funds Management. IRMS identifies account numbers, account holder names and other summary data. However, IRMS does not identify all IIM accounts associated with a specific individual. Additionally, Grant Thornton LLP provided us with a list of the 1,208 account numbers that were mailed Statements. We did not consider any data from the Trust Funds Accounting System in our review as that system did not come on-line until September 1998.

10. We reviewed the IRMS data in three phases. In the first phase, we identified all accounts in the IRMS data that had either:

- A Social Security Number identical to one of the 1,208 White Mountain Apache judgment IIM accounts; or
- An account number identical to one of the 1,208 White Mountain Apache judgment IIM accounts and that appeared outside of the Phoenix Area; or
- An account number within the Phoenix Area that contained the same numeric account number data as any one of the 1,208 White Mountain Apache judgment IIM accounts and a different character code (*e.g.*, 607**J**123456 and 607**U**123456). The fourth alpha character in the account number indicates the type of account (*e.g.*, 'J' indicates a judgment account and 'U' indicates a land-based account for an individual who is not an original allottee).

11. In phase two, we compared the name information associated with the 1,208 White Mountain Apache judgment IIM account holders to that of the corresponding account(s) identified in phase one. We used several matching criteria to determine if a given pair of accounts had a matching name.

12. In phase three of the analysis, we compared the name information for the 1,208 White Mountain Apache judgment IIM accounts to all of the available name information for any other account in the IRMS data.

13. As a result of the phase one and two analyses, we concluded that one (1) of the 1,208 White Mountain Apache IIM judgment accounts has a related account in IRMS that had its first transaction on or before February 4, 1997. This related account is a land-based account in the Phoenix area. As a result of the phase three analysis, we identified 73 White Mountain Apache judgment IIM accounts that require additional review to determine if the account holders have another account in IRMS that was open on or before February 4, 1997.

I declare under penalty of perjury that the foregoing is true and correct. Executed on February 6, 2003.

Robert L. Brunner

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
Plaintiffs,	)	
v.	)	Case No. 1:96CV01285
GALE NORTON, Secretary of the Interior, et al.,	)	(Judge Lamberth)
Defendants.	)	

ORDER

This matter comes before the Court on plaintiffs' Motion for Order Directing Defendants to Rescind Notice Sent to 1200 Trust Beneficiaries and Interior Defendants' Motion for Authority To Communicate with Class Members Regarding Historical Statements of Account. Upon consideration of the motions, the responses thereto, and the record in this case, it is hereby

ORDERED that plaintiffs' Motion is DENIED. It is further

ORDERED that Interior Defendants' Motion is GRANTED. It is further

ORDERED that Interior may resume mailing completed historical statements of account to the class member Individual Indian Money account holders for whom they were prepared.

Alternatively, it is further

ORDERED that the transmittal letter accompanying the historical statements of account shall contain the following notice:

> **Please be aware that the account holder for whom this historical statement of account was prepared is a member of a class action lawsuit, Cobell v. Norton, No. 1:96CV01285 (D.D.C.) (Judge Lamberth). Nothing in this notice should be interpreted as eliminating any rights that the account holder has as a class member in that litigation. If the account holder fails to challenge this historical statement of account they do not lose any rights that they have as a class member. For further information you may contact counsel for the class members, Dennis M Gingold,**

Esq., 1275 Pennsylvania Avenue, N.W., Ninth Floor, Washington, D.C. 20004, (202)661-6381, or Keith Harper, Esq., Native American Rights Fund, 1712 N Street, NW, Washington, D.C. 20036-2976, (202)785-4166. You may also access further information at plaintiffs' website www.indiantrust.com.

It is further

ORDERED that Interior Defendants do not need to send any further communication to class members that received a historical statement of account.

Alternatively, it is further

ORDERED that Interior Defendants shall send a letter to any class member that previously received a historical statement of account with the following notice:

> **Please be aware that Individual Indian Money account holders are members of a class action lawsuit, Cobell v. Norton, No. 1:96CV01285 (D.D.C.) (Judge Lamberth). In October 2002 the above-referenced account holder received a Historical Statement of Account, along with a cover letter notifying the account holder of the action they should take if they wanted to challenge the accuracy of that statement. Nothing in that notice should be interpreted as eliminating any rights that the account holder has as a class member in Cobell. If they fail to challenge the historical statement of account they do not lose any rights that they have as a class member. For further information you may contact counsel for the class members, Dennis M Gingold, Esq., 1275 Pennsylvania Avenue, N.W., Ninth Floor, Washington, D.C. 20004, (202)661-6381, or Keith Harper, Esq., Native American Rights Fund, 1712 N Street, NW, Washington, D.C. 20036-2976, (202)785-4166. You may also access further information at plaintiffs' website www.indiantrust.com.**

SO ORDERED.

Date: _____

_____
ROYCE C. LAMBERTH
United States District Judge

cc:

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202-822-0068

Elliott Levitas, Esq.
1100 Peachtree Street, Suite 2800
Atlanta, GA 30309-4530

CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on February 6, 2003 I served the foregoing *Interior Defendants' Motion for Authority to Communicate with Class Members Regarding the Historical Statements of Account* by facsimile in accordance with their written request of October 31, 2001 upon:

Keith Harper, Esq.
Native American Rights Fund
1712 N Street, N.W.
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(202) 822-0068

Dennis M Gingold, Esq.
Mark Kester Brown, Esq.
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By U.S. Mail upon:

Elliott Levitas, Esq.
1100 Peachtree Street, Suite 2800
Atlanta, GA 30309-4530

By facsimile and U.S. Mail upon:

Alan L. Balaran, Esq.
Special Master
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(202) 986-8477

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Special Master Monitor
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K.P. Kingston

Kevin P. Kingston