

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANTS' RESPONSE
AS REQUIRED BY ORDER OF FEBRUARY 7, 2005

In its Memorandum Opinion and Order of February 7, 2005, the Court directed the Defendants to either concede that trust checks were withheld, and other acts were taken against beneficiaries, as found by the Court in its October 22, 2004 decision, and as tentatively affirmed in the Court's February 7, 2005 opinion, or request an evidentiary hearing at which the Secretary of Interior would appear to rebut these findings. Defendants respectfully decline the evidentiary hearing proposed by the Court because they believe that the Court's principal finding of retaliation – that trust checks were withheld or ordered withheld – is not supported and, indeed, contrary to the record, and because, even if an evidentiary hearing were required, officials of a lower level than a Cabinet officer, would more appropriately provide evidence.

STATEMENT

Defendants respectfully submit that, in their Motion to Reconsider, they demonstrated that the record evidence does not support the Court's findings of retaliation in the October 22 Memorandum Opinion. See Motion to Reconsider at 11-18. In its February 7, 2005 Memorandum Opinion, the Court focused on whether Interior instructed or allowed BIA to withhold trust checks.

Francelia Phillips is the one individual who states that she was told that her trust check was going to be withheld. As discussed in the Motion to Reconsider, Defendants filed two declarations explaining that Ms. Phillips' check was processed in the ordinary course of business and was not withheld. Motion at 15-16. The Court correctly notes that Defendants' declarations did not try to rebut Ms. Phillips' statements that she was told by BIA employees at the Winnebago Agency between October 6, 2004, and October 8, 2004, that her trust check was going to be withheld as a result of the Court's September 29 Order. February 7 Mem. Op. at 6.

But this silence should not be taken as a concession by Defendants that Ms. Phillips' trust check was indeed withheld or that she was otherwise being retaliated against. February 7 Mem. Op. at 7, 20. As described in detail in the November 18, 2004 Declaration of Michael Hackett (attached as an exhibit to Defendants' Notice Regarding Plaintiffs' Emergency Notice Regarding the Failure to Distribute Trust Checks (November 18, 2004)), it was physically impossible for Ms. Phillips' check to have been withheld between October 1, and October 8, when Ms. Phillips states that she was told that her check was going to be withheld. Ms. Phillips' trust check is generated under the Conservation Reserve Program, a Department of Agriculture program that distributes payments to place land in conserving uses. Hackett Declaration at ¶ 2. Under this

program, the trust checks are made out to the BIA and only reference allotment numbers. Id. at ¶ 3. The identity of a beneficiary cannot be determined from the face of the check. Id. BIA officials process the checks after receipt to determine the allotment to which each check belongs, a process that may take several days depending upon various factors, including the level of fractionation for each allotment. Id. at ¶¶ 4,5.

The BIA did not receive the check from the Conservation Reserve Program that included Ms. Phillips' interest until October 12, 2004, along with 161 other checks. Id. at ¶¶ 9, 15, 17. The payment for Ms. Phillips' interest was processed in the same manner as all of the other checks received that day. Id. at ¶ 17. After processing, BIA transmitted the appropriate information to the OTFM, which generated the trust check for payment to Ms. Phillips. Id. at ¶¶ 8, 14. "At no time was a priority placed upon any given individual, nor were any delays introduced into the process." Id. at ¶ 17. "No retaliation against Ms. Phillips occurred." Id.

Ms. Phillips' trust check could not have been withheld during the period from October 1 through 8 – when Ms. Phillips states that she was told that her trust check was being withheld – because BIA had not received her payment during that period. Thus, while Defendants did not dispute that Ms. Phillips may have been regrettably misinformed about the status of her trust payment in her conversations with BIA officials at her local Winnebago Agency during October 6 through 8, they did not concede – and could not have conceded – that her check was withheld during that period. As shown in the unrebutted declaration of Mr. Hackett, the check was not withheld or delayed at any point.

The only other individual whom Plaintiffs have identified as having a trust check withheld is Carmen Patricio, discussed by the Court at pages 6 to 7 in the Court's February 7

Memorandum Opinion.' Defendants filed the December 14, 2004 Declaration of Nina Siqueros (attached as an exhibit to Defendants' Notice Regarding Plaintiffs' Emergency Notice Regarding Ongoing Retaliation in Violation of This Court's Orders (December 14, 2004)), explaining that Ms. Patricio's trust check also was not withheld or delayed.

Ms. Patricio does not state that during the period between October 1, 2004, and October 8, 2004, her trust check was withheld because of the Court's orders or that she was told it was going to be withheld. Instead, she states that on October 5, 2004, a local BIA Papago Agency official said that she could not be given information about the status of her trust check because of the September 29 Order. Patricio Affidavit at ¶ 3. She acknowledges that in another conversation later that same day, the same official "answered my questions regarding my trust check." *Id.* at 5.

As with Ms. Phillips, the Court correctly notes that Defendants did not seek to rebut Ms. Patricio's statement that on October 5, 2004, a Papago Agency official may have misinformed Ms. Patricio that she was unable to communicate with her about the status of her trust check because of the Court's September 29 Order. But this is not a concession that Ms. Patricio's trust check was withheld. February 7, 2005 Mem. Op. at 7, 20. As with Ms. Phillips, the issue of what Ms. Patricio was erroneously told initially on October 5 about her trust check cannot be conflated with the separate issue of whether her trust check was actually withheld.

^{1/} Plaintiffs did not bring Ms. Patricio's claims to the Court's attention until November 15, 2004, when they filed her affidavit as an attachment to their Emergency Notice Regarding Ongoing Retaliation in Violation of This Court's Orders; this, of course, was after the Court's October 22 Memorandum Opinion had issued.

As detailed in the Siqueros Declaration, Ms. Patricio's trust check was not withheld. Ms. Patricio's trust check is generated as a result of royalties paid by Asarco, Inc. for copper mined on land in which Ms. Patricio owns an interest. Siqueros Declaration at ¶ 4. The Papago Agency received the royalty payments by electronic funds transfer from Asarco. Id. at ¶ 5. BIA processed the payment from Asarco, but the check to Ms. Patricio is generated and sent by the Office of the Special Trustee in Albuquerque, New Mexico. Id. at ¶¶ 5, 6. Ms. Patricio's August 2004 royalty payment was posted on September 28, 2004, processed by BIA, and payment was sent to Ms. Patricio on October 6, 2004. Id. at ¶ 7. "At no time did BIA or the Papago Agency attempt to delay or withhold any royalty payments." Id. at ¶ 9. "Ms. Patricio's trust payments were processed in the ordinary course of business and the processing time is unrelated to any court orders in Cobell v. Norton." Id. at ¶ 10.

No other individuals have claimed that their trust checks were withheld or that they were told that their trust checks were being withheld. The Court briefly discusses several other individuals who claim that they were unable to speak with local agency officials during the first week of October, see February 7 Memorandum Opinion at 8-9, but these individuals do not claim that trust checks were withheld or that they were unable to obtain information about a trust check.²

² Some of this discussion involves individuals who were only referred to by initials. February 7 Mem. Op. at 8. The Court had instructed Plaintiffs to supply the names of these anonymous individuals so that Interior could investigate their claims. See October 6, 2004, Tr. at 18:1-2 (if Interior is not given the names of those complaining "[h]ow does that allow the defendants to contest the basic information?"); id. at 20:9-11. ("You can provide their names and affidavits to the defendants, and then they can quit shadow boxing and get the true facts."). Plaintiffs never supplied their names.

The Court expressed concern that the October 4 instructions did not expressly inform the local agency employees that trust checks were not to be withheld as a result of the Court's Orders, and that such advice was only included in the October 8 instructions. February 7 Mem. Op. at 9. However, as was noted at the October 6, 2004 status conference, and again in the Motion to Reconsider, the local agency employees to whom the October 4 instructions;were sent do not send out trust checks. See October 6,2004, Tr. at 15:15-16:3; Motion to Reconsider at 8 n.10.³

Thus, Defendants respectfully submit that the Court's statements in the October 22 Memorandum Opinion that "the entire process by which payments are made to **IIM** account holders from lease revenues, royalties, and so forth was similarly shut down," and that "the tenor of the Secretary's instructions apparently led many employees to hold payments," are unsupported and conflict with record evidence. See Cobell v. Norton, 224 F.R.D. 266,270 (D.D.C. 2004).⁴ As discussed above, the more qualified statements that trust checks were withheld are also unsupported.

The current assertions of retaliation are unrelated to any "live" claim. They arose because Plaintiffs filed several "notices" in early October 2004, claiming "retaliation" by Interior in response to the Court's communications directive. No evidentiary hearing on these allegations was conducted. Cf. Cobell v. Norton, 391 F.3d 251,261 (D.C. Cir. 2004). As noted above, the

³ The Court previously recognized that "IIM trust payments . . . are controlled by OTFM." Cobell v. Babbitt, 91 F. Supp. 2d 1, 10-11 (D.D.C. 1999).

⁴ Defendants submitted the December 21,2004 Declaration of Robert J. Winter as Exhibit 5 to the Motion to Reconsider. In his declaration, Mr. Winter provided the Court with precise information about the number of trust checks that were sent out to IIM beneficiaries during the month of October 2004, including 3,533 checks totaling \$1,668,061.51 during the six business days between October 1 and 8, 2004. He also provided data indicating a similar pattern in the preceding year.

record does not support the claims of retaliation and, therefore, an evidentiary hearing is unnecessary. But, even if one were, officials of a lower level than a Cabinet officer, would more appropriately provide evidence.

For these reasons, Defendants respectfully decline the Court's February 7th invitation of a hearing at which the Secretary of Interior would testify.

Dated: February 22,2005

Respectfully submitted,

ROBERT D. McCALLUM, JR.

Associate Attorney General

PETER D. KEISLER

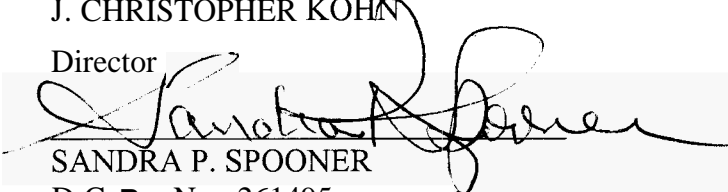
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Oppositions and Replies

1:96-cv-01285-RCL COBELL, et al v. NORTON, et al

U.S. District Court

District of Columbia

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