

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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

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**DEFENDANTS' MOTION TO RECONSIDER  
THE OCTOBER 22, 2004 MEMORANDUM OPINION**

**BACKGROUND**

On October 22, 2004, the Court concluded that "the Secretary, in a fit of pique and perhaps anger at both the Court and the plaintiffs for the issuance of the September 29 Order, simply retaliated against the Indian beneficiaries under the thin disguise of a preposterous and facially false 'interpretation' of the Court's Order." Cobell v. Norton, 224 F.R.D. 266, 271 (D.D.C. 2004). The Court cited no evidence for this conclusion; no such evidence exists. In the October 22, 2004 Memorandum Opinion, the Court also made several statements of fact – without citation to evidence – regarding actions supposedly taken by the Secretary and the Department of the Interior in the wake of the September 29, 2004 Order, which are also unsupported by facts presented to the Court by the parties. See id. at 270-71.

The Court's conclusions and findings in the October 22 Memorandum Opinion related to so-called retaliation were not used to support the October 22 Order which accompanied the Memorandum Opinion and are thus dicta and not the law of the case in these proceedings. If the past is a faithful guide, however, the Court's conclusions regarding retaliation will become the

"lore" of the case, and Plaintiffs will now routinely cite the Court's language about retaliation in most of their papers, as if it were conclusively established. Indeed, unfortunately, the Court itself has already cited these "findings" as if they were true. See Cobell v. Norton, 2004 WL 2603555, at \*11 n.2 (D.D.C. Nov. 17, 2004).

Because the Court cited no evidence, Defendants do not know what information the Court relied upon in making its conclusions. Nonetheless, the Court is mistaken. Because the Court has misunderstood the position and actions of Defendants, the Court should reconsider the statements in the October 22, 2004 Memorandum Opinion related to its findings of retaliation.<sup>1</sup> In any event, a finding of retaliation should not be made without consideration of admissible evidence from all parties.<sup>2</sup>

## **ARGUMENT**

### **JUSTICE REQUIRES THAT THE COURT RECONSIDER ITS UNSUPPORTED STATEMENTS REGARDING RETALIATION**

#### **A. Standards on Motion for Reconsideration**

Federal Rule of Civil Procedure 54(b) "governs reconsideration of orders that do not constitute final judgments in a case." Cobell, 224 F.R.D. at 271. The Court has concluded that it "will adhere to the 'as justice requires' standard for determining whether to grant reconsideration of an interlocutory order under Rule 54(b)." Id. at 272. Application of this standard "amounts to

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<sup>1</sup> Defendants are not moving, at this time, to reconsider the October 22, 2004 Order, or the balance of the October 22, 2004 Memorandum Opinion, but merely ask the Court to eliminate the three unfounded paragraphs of the Memorandum Opinion that begin with "It came to the Court's attention . . ." and end with "the Secretary's motive for her bad faith interpretation and retaliation passes understanding." 224 F.R.D. at 270-71.

<sup>2</sup> Plaintiffs' counsel informed Defendants' counsel that Plaintiffs intend to oppose this Motion.

determining, within the Court's discretion, whether reconsideration is necessary under the relevant circumstances." Id.

The Court noted that there "does not seem to be any real distinction" between the "as justice requires" standard and that employed by other courts, such as the one in Neal v. Honeywell, 1996 WL 627616 (N.D. Ill. Oct. 25, 1996). Cobell, 224 F.R.D. at 272. In Neal, the court concluded that a motion for reconsideration is appropriate where "the Court has patently misunderstood a party, or has made a decision outside the adversarial issues presented to the Court by the parties, or has made an error not of reasoning but of apprehension." Neal, 1996 WL 627616, at \*2-3 (quoting Bank of Waunakee v. Rochester Cheese Sales, Inc., 906 F.2d 1185, 1191 (7th Cir. 1990)). In its October 22 Memorandum Opinion, the Court revealed that it has "patently misunderstood" the positions and actions of Defendants regarding the interpretation and implementation of the Court's September 29, 2004 Order. The Court's errors were not mistakes of reasoning, but rather were mistakes of "apprehension." As discussed below, the information provided to the Court simply does not support the facts as discussed by the Court.

Moreover, the issue of "retaliation" is outside the adversarial issues presented to the Court in the October 22 Order and thus unnecessary. It was not relied upon by the Court to support any of the relief provided in the October 22 Order accompanying the Memorandum Opinion. Indeed it was not relevant to any of the other matters discussed in the Memorandum Opinion. The Court's conclusions on retaliation are thus *dicta*, and might simply be ignored as improvident, but without application to further proceedings in the case. In this case, however, such *dicta* become part of the "lore" of the case which Plaintiffs cite in almost all future filings as evidence of

wrongdoing. As mentioned above, even the Court itself has already cited the retaliation *dicta* from the October 22 Memorandum Opinion as if it were established.

Under these circumstances, the Court should reconsider the three paragraphs in the October 22 Memorandum Opinion which include discussion of the supposed "retaliation" and remove the inaccurate *dicta*.

**B. Defendants' Interpretations of the September 29 Order Do Not Show Retaliation**

In the October 22 Memorandum Opinion, the Court derides Defendants' interpretations of the September 29 Order as "infantile, and frankly ridiculous." 224 F.R.D. at 270. But this ignores that the September 29 Order required immediate interpretation by Defendants in at least three areas.<sup>3</sup> The first two related to the *scope* of the Court's September 29 Order. First, when the Court forbade all communications between the Interior Defendants and members of the Plaintiff class until a Court-approved notice was included with the communication,<sup>4</sup> did the

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<sup>3</sup> As Defendants sought to implement the Court's Order it became apparent that several additional practical ambiguities existed. Defendants then sought guidance from the Court on those areas also.

<sup>4</sup> The entire relevant paragraph of the September 29 Order read as follows, until clarified by the October 1 Order:

ORDERED that henceforth, communications between the Interior defendants, their agents, representatives, employees, officers, and counsel and members of the plaintiff class may proceed only if a Court-approved version of the above-described notice is conspicuously displayed on such communications and then only between the Interior defendants, their agents, representatives, officers, and counsel and plaintiffs' counsel unless the class member with whom communication is sought has waived his or her right to consult class counsel, in which case communication may proceed between the Interior defendants, their agents, representatives, employees, officers, and counsel and the individual class member.

September 29, 2004 Order at 3.

Order mean what it literally said and all communications were prohibited, or, rather, did the Court intend it to mean that the prohibition on communications should be restricted to those regarding the sale, exchange, transfer, or conversion of Indian trust land? Second, even assuming that the communications ban was limited to land sales, did the Order really mean all communications related to land sales, or rather, did the Court intend that sending a check related to a land sale – although technically a "communication" – was exempt from the Court's communication ban?

On the first issue, Defendants decided that it would be unwise not to interpret the September 29 Order literally, without seeking the Court's guidance.<sup>5</sup> Therefore, on September 30, 2004, less than 24 hours after the September 29 Order was issued, they sought a hearing to obtain clarification. See Defendants' Request for Emergency Status Conference (September 30, 2004). After a status conference on October 1, 2004, the Court modified its September 29 Order to clarify that the scope of its ban on communications was limited to land sales. See October 1, 2004 Order.

As to the second interpretation issue, Defendants were in an exceedingly difficult position on September 30, 2004. Sending a check to a class member was obviously a "communication" with a beneficiary and might be interpreted as banned by the straightforward language of the September 29 Order. In a preliminary exchange of internal, deliberative, pre-decisional emails

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<sup>5</sup> Given Plaintiffs' penchant for threatening and seeking contempt against a wide array of government officials, caution by such officials in interpreting an order in possible derogation of its literal language is not surprising.

among managers that were provided to the Court by Plaintiffs,<sup>6</sup> these managers pointed out that one possible and straightforward interpretation of the September 29 Order might include a ban on checks. See Email from Ross Swimmer to OST senior managers (7:54 a.m., September 30, 2004) (attached as Exhibit 1);<sup>7</sup> Email from Donna Erwin (1:26 p.m., September 30, 2004) (attached as Exhibit 2).<sup>8</sup> Counsel for Defendants advised the Court at the October 1 status conference that these emails were "only one page in a chain of e-mails in which personnel within the Office of Trustee are discussing the possible meanings of Your Honor's order . . . ." October 1, 2004, Tr. at 9:23-10:1.

While trying to sort out the meaning of the Court's Order, the Secretary affirmatively decided that no checks would be withheld and that Defendants would confirm with the Court at the October 1 status conference that the Court did not intend to include the mailing of a check within the ambit of a banned "communication." Counsel for Defendants repeatedly informed the Court at the October 1 hearing that by order of the Secretary checks were not to be withheld. See, e.g., October 1, 2004, Tr. at 9:13 ("The checks are not being withheld."); October 1, 2004, Tr. at 16:5-8 ("I have inquired. I have met with the Secretary of the Interior. She has decided that checks will not be delayed. There is no indication that checks are being held up."); October 1, 2004, Tr. at 32:4-6 ("I was in the office of the Interior yesterday when the Secretary

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<sup>6</sup> Defendants do not know who revealed these confidential deliberations to Plaintiffs, but they were not provided officially by Interior or Interior's counsel.

<sup>7</sup> The September 30 Swimmer email was attached as an exhibit to Plaintiffs [sic] Request for Emergency Status Call to Prevent Further Retaliation To Individual Indian Trust Beneficiaries (September 30, 2004).

<sup>8</sup> The September 30 Erwin email was provided to the Court by Plaintiffs' attorneys at the October 1 status conference.

determined that under no circumstances would your order stop the payment of checks in the ordinary course." ). At the October 1 status conference, the Court upheld the Secretary's interpretation and clarified that checks should not be withheld. See, e.g., October 1, 2004, Tr, 17:3-4 ("If it's a question of sending checks, I'm not stopping any sending of any checks and I never have").

Interior has provided five official "notices" – as opposed to internal deliberations amongst managers – to its employees and representatives about how the September 29 Order (as clarified on October 1) and the October 22 Order (as clarified on November 17) are to be interpreted and implemented with regard to communications with class members. The Court has been given copies of all five of these notices.<sup>9</sup> None of these notices provided that the Court's orders should be interpreted as requiring the withholding of checks. Indeed, the Third Notice (from October 8, 2004) explicitly clarified that the Court's orders did not "affect our normal processes of receiving payment checks on behalf of individual Indians, the processing of those checks or the subsequent payment of funds to individual Indian recipients." Third Notice at 2 (attached as Exhibit 3). It

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<sup>9</sup> The September 30, 2004 Notice ("First Notice") was provided to the Court as an exhibit to Defendants' Request for Emergency Status Conference (September 30, 2004); the October 4, 2004 Notice ("Second Notice") was provided to the Court at the October 6, 2004 status conference and as an exhibit to Defendants' Notice of Filing (October 12, 2004); the October 8, 2004 Notice ("Third Notice") was provided to the Court as an exhibit to Defendants' Notice of Filing (October 12, 2004); the November 22, 2004 Notice ("Fourth Notice") was provided to the Court as an exhibit to Defendants' Notice of Filing (November 29, 2004); the December 10, 2004 Notice ("Fifth Notice") was provided to the Court as an exhibit to Defendants' Notice of Filing (December 13, 2004).

instructed the reader to "communicate with and reassure individual Indians that there are no court-related delays in processing funds." Id.<sup>10</sup>

Parenthetically, Plaintiffs later argued that the Court-approved notice to be sent out with all land sales communications referred to in the September 29 Order should also be sent out with checks. See Plaintiffs' Comments on Defendants' November 4, 2004 Notice of Filing Proposed Notice and Order, at 4 (November 9, 2004). Thus, if it was "infantile" and "ridiculous" to conclude that sending a check might be a communication that was prohibited until the Court-approved notice was created, it is one that was later shared by Plaintiffs' lawyers. After deliberation, however – as the Court was explicitly advised – Defendants rejected this interpretation and concluded, as of September 30, 2004, that the September 29 Order did not require the withholding of checks.

The third issue of interpretation precipitated by the September 29 Order involved the interplay between the Court's December 23, 2002 Order and the September 29 Order. As the Court explained in its Memorandum Opinion, the September 29 Order was merely a supplement to the December 23, 2002 Order. September 29, 2004 Mem. Op. at 23. The Court found in the September 29 Memorandum Opinion that Interior had violated the December 23 Order by communicating with beneficiaries on matters related to land sales. September 29 Mem. Op. at 2, 23. This legitimately raised the question of what other matters on which Interior heretofore had

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<sup>10/</sup> At the October 6, 2004 hearing, Defendants' counsel informed the Court that the earlier notices had not contained information about checks because checks are mailed out centrally from OST, and therefore it was unnecessary to give specific notice to the field telling them not to withhold checks. October 6, 2004, Tr. at 15:15-16:3. The information was included in the Third Notice because "[i]t has also been brought to our attention that some individuals appear to be confused about any effect that the court's most recent Orders may have upon the payment of checks to individual Indians." Third Notice at 2.



routinely communicated with beneficiaries might, under the rationale provided in the September 29 Memorandum Opinion, also be deemed to be in violation of the communication ban in the December 23 Order.

The December 23, 2002 Order permitted ordinary course of business communications "because they do not purport to extinguish the rights of the class members in this litigation." Cobell v. Norton, 212 F.R.D. 14, 20 (D.D.C. 2002). An example of such a permitted communication was the distribution of quarterly statements of account, "because defendants possess an independent reason to send out such statements. These statements would be distributed anyway, regardless of the instant litigation." 212 F.R.D. at 22. Land sales had proceeded in the ordinary course of business for over 18 months without challenge by Plaintiffs and presumably in conformity with the December 23 Order.

Upon issuance of the September 29 Order, the assumed meaning of the December 23 Order was redefined and Defendants needed immediately to determine whether other types of seemingly ordinary course of business communications might similarly be deemed to violate the December 23, 2002 Order. To be safe, Interior tried to identify as many areas of communication that seemed similar to land sales. It was from this analysis that Interior identified the "items 2 through 8" in the First Notice, sent out to its employees on September 30, 2004, that the Court later found objectionable in the October 22 Memorandum Opinion. See 224 F.R.D. at 270-71 ("The Secretary's addition, in her instructions promulgated to Interior on September 30, 2004, of items 2 through 8 on the list of subjects of communication between Interior and Indians restricted by this Court's Order, before seeking any clarification from the Court, is yet another example of how the Secretary treats these Indian beneficiaries . . . ."). Defendants tried to confirm at the

October 1 status conference that communications related to the areas listed in "items 2 through 8" were not in violation of the December 23, 2002 Order, or its supplemental order, the September 29, 2004 Order, see October 1, 2004, Tr. at 12:8-19, but it was not until the October 22 Order that the Court clarified that communications related to these items were not improper under either the December 23, 2002 Order or the September 29 Order. See 224 F.R.D. at 288. Defendants remain at risk of being found in violation of the December 23, 2002 Order, if Plaintiffs come forward with some other ordinary course of business communication related to a topic – like land sales – where the beneficiary has to make a decision and they have not yet received the accounting information to which they are entitled.

Defendants did not adopt "totally bogus" interpretations of the Court's orders, or advance interpretations that were a "disguise" or "facially false," or act in "bad faith." 224 F.R.D. 271. Instead, they responded with propriety to ensure that their conduct conformed to the Court's interpretation of its orders.

**C. Defendants' Actions after the September 29 Order Was Issued Do Not Support a Finding of Retaliation**

In the October 22 Memorandum Opinion, the Court also concluded that Interior Defendants took certain improper actions because of their improper interpretation of the Court's September 29 Order. 224 F.R.D. 270-71. As discussed above, the Court is mistaken regarding Defendants' interpretations of the Court's orders. Furthermore, the information submitted to the Court does not support the statements of the Court about the actions taken by Defendants after the September 29 Order was issued.

**Shutting down the BIA/Closing field offices.** In the October 22 Memorandum Opinion, the Court found, without citation, "that, initially, Interior felt that compliance with the September 29, 2004 Order required Interior to shut down the Bureau of Indian Affairs entirely." 224 F.R.D. at 270. The Court also found, again without citation, that "[f]ield offices were closed and notices were affixed to their doors explaining that no business could be conducted due to this Court's Order of September 29, 2004 . . . ." Id.

Perhaps the Court was simply using hyperbole, but no information submitted to the Court indicated that the BIA was "shut down" or that field offices were "closed." Plaintiffs supplied information to the Court regarding one instance in which a BIA field office in Oklahoma at the Anadarko Agency posted a one-page notice on its door, apparently for three business days at the beginning of October, indicating that:

Due to the September 29, 2004 Cobell Court order we cannot discuss any trust transactions or matters at this time with members of the plaintiff class as determined by the federal court. All Realty and Soil and Moisture offices are closed for business until further notice.

Notice, dated October 1, 2004, Anadarko Agency (attached as Exhibit 4).<sup>11</sup>

The Anadarko Notice did not indicate that the entire agency office was closed, but rather only that two of its divisions, Realty and Soil & Moisture, were closed and that the employees at the agency could not discuss matters related to trust transactions. It specifically told the reader that "Business related to non-trust matters will continue." Id.

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<sup>11</sup> Plaintiffs gave this Notice to the Court at the October 6 status conference. Plaintiffs' counsel claimed that the Notice was still posted at the agency as of October 5. October 6, 2004, Tr. at 5:17-6:2.

As discussed above, this Notice was proper as of Friday, October 1, 2004, when it was first posted, because this was before the Court had clarified that its communications ban was limited to land sales matters. After Interior's Second Notice of October 4, 2004 had been disseminated to its employees and representatives, the Anadarko Notice would no longer have been proper, to the extent that it conveyed a prohibition on communications unrelated to land sales. However, as Defendants' counsel explained to the Court at the October 6 hearing, it takes time for instructions to be sent to all the employees and representatives at an agency as large as Interior. See October 6, 2004, Tr. at 10:10-18 (It is not surprising that it would take a certain amount of time for an agency of 77,000 people "to get all of the instructions. However, Interior began immediately after the conference on Friday [October 1], and worked over the weekend to draft instructions. Those instructions were reviewed and obtained legal clearance on Monday [October 4] ... [and] were distributed in large part on Monday."); see also October 6, 2004, Tr. at 11:19-22 (By October 6, Interior had "contacted all of the regions, had personal phone conversations with all the regions, and with the 80 . . . agencies, all in an attempt to provide the Court's instructions to them and to provide guidance."). It is thus not surprising that the Anadarko Notice was posted for two extra business days after it should have been removed, or at least modified to reflect the guidance from the Court. At the October 6 status conference, the Court seemed to agree. See October 6, 2004, Tr. at 40:16-18 ("I understand that the Interior Department is a big department and it takes time to get the right instructions out to everybody . . .").

The Anadarko incident does not support the Court's statements that the BIA was shut down or that field offices were closed, and no other evidence was provided that would support

these statements. To be sure, Plaintiffs also provided the Court notice of twelve individuals who supposedly were told by employees at several different agency field offices during the first few business days of October that they could not speak with them about their IIM trust matters because of the Court's order.<sup>12</sup> Eight of these twelve individuals were only referred to in code by their initials and thus Interior is unable to investigate whether their complaints were valid. On October 6, 2004, the Court directed Plaintiffs to provide the full names of complaining individuals so that Interior could quit "shadow boxing" and get to the truth. 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."). After this direction from the Court, Plaintiffs revealed the names of only two beneficiaries. See October 8, 2004 Corrected Affidavit of Geoffrey Rempel (in which it is revealed that "FP" is actually Francelia Phillips); November 15, 2004 Affidavit of Geoffrey Rempel (in which it is

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<sup>12</sup> See October 5, 2004 Affidavit of Charlotte Buttram, a legal assistant with Plaintiffs' counsel (attached as an exhibit to Plaintiffs' Request for Second Emergency Status Conference – To Address Ongoing Retaliation Taken By Interior Secretary Gale Norton Against Individual Indian Trust Beneficiaries (October 5, 2004) ("Second Notice")); October 4, 2004 Affidavit of Elouise Cobell (attached as an exhibit to the Second Notice); October 4, 2004 Affidavit of Margaret Coburn (attached as an exhibit to the Second Notice); October 5, 2004 Affidavit of Geoffrey Rempel, an assistant to Plaintiffs' counsel (attached as an exhibit to the Second Notice); October 5, 2004 Certification from Shirley Cain, a Turtle Mountain Tribal Court "Special Judge/Consultant" (attached as an exhibit to Plaintiffs' Second Notice of Supplemental Information Regarding Plaintiffs' Request for Second Emergency Status Conference – To Address Ongoing Retaliation Taken By Interior Secretary Gale Norton Against Individual Indian Trust Beneficiaries (October 6, 2004) ("Fourth Notice")); October 5, 2004 Affidavit of Terry Evans (attached as an exhibit to the Fourth Notice); October 6, 2004 Affidavit of Ruth Hargrow (attached as an exhibit to the Fourth Notice); October 8, 2004 Affidavit of Francelia Phillips (attached as an exhibit to Plaintiffs' First Notice of Supplemental Information Regarding Ongoing Retaliation Taken By Interior Secretary Gale Norton Against Individual Indian Trust Beneficiaries (October 8, 2004) ("Fifth Notice")).

revealed that "CP" is Carmen Patricio). Moreover, based on Plaintiffs' submissions many of these beneficiaries may have been complaining that the agency officials would not talk to them about land sales activities – which was prohibited by the September 29 Order.

However, even if all of the complaints produced by Plaintiffs were valid, these isolated incidents do not support the Court's statement in the October 22 Memorandum Opinion that the BIA was shut down or that field offices were closed. They would only indicate that after the Court's September 29 Order was clarified on October 1, it took a few business days for the Secretary's instructions to be received and implemented by all of the agency employees and representatives. The BIA was not shut down in the wake of the Court's September 29 Order. Field offices were not closed and signs to that effect were not posted on agency office doors.

**Replacing live telephone operators with recorded messages.** The Court found, again without citation, that "apparently all live telephone operators were replaced with a recorded message of the same stripe [that no business could be conducted due to the Court's Order]." 224 F.R.D. at 270. The Plaintiffs only provided the Court information about one instance in which a recorded message was left at an agency – and it was at the same Anadarko agency where the notice was posted to the door, as discussed above. See October 5, 2004 Affidavit of Geoffrey Rempel at ¶ 3 (attached as an exhibit to Plaintiffs' Second Notice). The Court's statement is also contradicted by the information supplied by Plaintiffs, discussed above, regarding individuals who complained that agency employees – live employees, not recordings – told them they could not speak with them about trust matters. The information provided to the Court does not support the Court's statement that "all" live telephone operators were replaced with recordings. Based on Plaintiffs' submissions, one agency had a recording, instead of a live operator, for two business

days in early October before the Secretary's instructions about the appropriate meaning of the Court's Order had been received and implemented.

**Withholding checks.** The Court also found 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 . . . ." 224 F.R.D. at 270. At the time that the Court wrote these statements, Plaintiffs had provided the Court with only one case in which a beneficiary – Francelia Phillips – claimed that a check was being withheld. See October 6, 2004 Affidavit of Geoffrey Rempel at ¶ 2 (attached as an exhibit to Plaintiffs' First Notice of Supplemental Information Regarding Plaintiffs' Request for Second Emergency Status Conference – To Address Ongoing Retaliation Taken By Interior Secretary Gale Norton Against Individual Indian Trust Beneficiaries (October 6, 2004) ("Third Notice")) (Mr. Rempel claims that he "spoke with a beneficiary (FP) who informed me that the BIA is withholding her trust check as a result of this Court's order."); October 8, 2004 Affidavit of Francelia Phillips (attached as an exhibit to Plaintiffs' Fifth Notice); October 19, 2004 Second Affidavit of Francelia Phillips (attached as an exhibit to Plaintiffs' Emergency Notice Regarding the Failure to Distribute Trust Checks (October 19, 2004) ("Sixth Notice")).<sup>13</sup> Defendants supplied the Court with two declarations which conclusively establish

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<sup>13</sup> Plaintiffs have since provided the Court with information about another beneficiary – Carmen Patricio – who claims that her trust check was withheld. See November 15, 2004 Affidavit of Carmen Patricio (attached as an exhibit to Plaintiffs' Emergency Notice Regarding Ongoing Retaliation in Violation of This Court's Orders (November 15, 2004) ("Seventh Notice")). Defendants filed the December 14, 2004 Declaration of Nina Siquieros, see 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 was not withheld or delayed.

that, notwithstanding what Ms. Phillips may have been told – or believed – her trust check was processed in the ordinary course of business and was not delayed or withheld because of the Court's orders. See October 19, 2004 Declaration of Teala C. Walker (supplied to the Court at the October 19, 2004 status conference); 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)).

Because IIM checks are drawn on accounts with the Department of the Treasury, OST prepares and regularly sends information to Treasury that identifies each check and its amount. See December 21, 2004 Declaration of Robert J. Winter (attached as Exhibit 5). To demonstrate that the issuance of the Court's September 29, 2004 Order did not disrupt the issuance of IIM checks, Interior compiled a report (attached to Winter Declaration) that shows the number of checks issued and the total amount of those checks for each day in September and October of 2004 as well as 2003. Winter Declaration at ¶ 1. The daily averages for those two months in 2003 are 1,730 checks totaling \$576,252 and for 2004 are 1,827 checks totaling \$657,311. Most importantly, the report shows that Interior never stopped issuing checks. For example, on September 30, 2004, OST issued 3,100 checks, the same day Plaintiffs allege Ross Swimmer had ordered that checks be stopped. Second, although the number and amount of checks fluctuates daily, the lower output days from 2004 match up with the lower output days from 2003. On the first three business days of October 2004, 763 checks were issued compared to 795 in 2003. On October 1, 2004, 283 checks; on the same day one year earlier, only 166. In sum, the report demonstrates that the Court's Order had no effect on Interior's issuance of IIM checks to class members.



Accordingly, the information supplied to the Court does not support a finding that the IIM trust payment system was shut down or that any employees withheld payments.

**Statements from Interior employees that checks were being withheld.** The Court also found that "in numerous cases, [employees told] the Indian beneficiaries that their checks were being withheld as a direct result of this Court's Order." 224 F.R.D. at 270. The issue of whether beneficiaries were told by Interior employees that their checks were going to be withheld is obviously conceptually distinct from whether the checks were actually withheld. But, again, Plaintiffs only supplied the Court with one beneficiary – the same Francelia Phillips discussed above – who claimed that an employee told her that her check was going to be withheld because of the Court's orders. See October 6, 2004 Affidavit of Geoffrey Rempel at ¶ 4 (attached as an exhibit to Plaintiffs' Third Notice); October 8, 2004 Affidavit of Francelia Phillips (attached as an exhibit to Plaintiffs' Fifth Notice). Again, Defendants informed the Court as to what actually occurred with regard to the processing and payment of Ms. Phillip's trust check before the Court issued its October 22 Memorandum Opinion. October 19, 2004, Tr. at 54:5-9 (discussing October 19, 2004 Declaration of Teala C. Walker); accord November 18, 2004 Declaration of Michael Hackett. Counsel for Defendants had previously informed the Court that if in fact Ms. Phillips had been told by a local agency employee that her check was being withheld or delayed because of the Court's orders, this employee spoke in error and was acting contrary to the official Interior memorandum regarding the meaning of the Court's order. See October 6, 2004, Tr. at 13:21-14:7; id. at 15:23-24. Counsel also explained to the Court that the checks are mailed out centrally, not by the local agency office employee who might have made such a statement to Ms. Phillips in error. Id. at 15:15-16:3.

In short, the one instance supplied by Plaintiffs in which a local employee may have mistakenly informed a beneficiary that her check was being delayed or withheld does not support the Court's statement in the October 22 Memorandum Opinion that in "numerous cases" employees were saying such things.<sup>14</sup>

The extraordinary finding that a Cabinet-level official retaliated against IIM beneficiaries should only be made after consideration of admissible evidence from all parties. See, e.g., Cobell v. Norton, No. 03-5262, 2004 WL 2753197, at \*9 (D.C. Cir. Dec. 3, 2004).<sup>15</sup> The Court's failure to do so here resulted in inaccurate statements of fact in the three paragraphs of the Court's October 22 Memorandum Opinion. The information supplied to the Court by the parties reveals that the Court misunderstood Defendants' positions and misapprehended the facts. Justice requires that the Court reconsider its statements of fact in the October 22 Memorandum Opinion, and delete the offending paragraphs.

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<sup>14</sup> Plaintiffs also provided the Court an October 1, 2004 letter from a tribal attorney who indicated that he was told by a government attorney that per capita payments from a settlement fund – some of which would go to IIM account holders – might be delayed because of the Court's Order. See October 1, 2004 Letter from Bertram Hirsch to Keith Harper (supplied to the Court at the October 1, 2004 status conference). This, of course, was not an example of checks actually being delayed, but rather, in multiple hearsay fashion, that checks might be delayed. As Defendants' counsel informed the Court at the October 1, 2004 status conference, the checks would not be delayed. See October 1, 2004, Tr. at 16:24-17:1 ("I can tell the Assistant United States Attorney that those checks can go out when they're prepared."). Significantly, the Plaintiffs never later supplied any evidence that these checks were actually delayed or withheld.

<sup>15</sup> Defendants are entitled to the opportunity to examine the "witnesses" presented by Plaintiffs and to present their own evidence refuting Plaintiffs' claims. Moreover, Plaintiffs must bear the burden of proof. See Cobell, 2004 WL 2753197 at \*7.

**CONCLUSION**

For these reasons, Defendants' Motion should be granted.

Dated: December 22, 2004

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on December 22, 2004 the foregoing *Defendants' Motion to Reconsider the October 22, 2004 Memorandum Opinion* was served by Electronic Case Filing, and on the following who is not registered for Electronic Case Filing, by facsimile:

Earl Old Person (*Pro se*)  
Blackfeet Tribe  
P.O. Box 850  
Browning, MT 59417  
Fax (406) 338-7530

/s/ Kevin P. Kingston  
Kevin P. Kingston

FYI take notice about outreach meetings.

— Forwarded by Doug Lords/OST/OS/DOI on 09/30/2004 08:06 AM —

Ross Spinauer  
09/30/2004 07:54 AM

To: OST\_Sr\_Mgr

cc:  
Subject: New Court Order

We have just been blessed with a new order from Judge Lamberth regarding communication with beneficiaries. There are several parts to the order and it will be discussed in D.C. this afternoon to try and glean what he is talking about. However, it is critical that any activity that may result in communication with beneficiaries be put on hold until further notice.

It is Ordered that, pursuant to Rule 23(d) of the Federal Rules of Civil Procedure, this Court's Order of December 23, 2002, is hereby supplemented as it applies to communications between the Interior defendants and class members related to the sale, exchange, transfer or conversion of Indian trust land as follows:

During the pendency of the instant litigation, the parties to the litigation, their agents, representatives, employees, officials, and counsel shall not communicate, through the United States mail or any other mode of communication, with any member of the plaintiff class in this litigation regarding the sale, exchange, transfer, or conversion of any Indian trust land unless such communication is conspicuously marked with a notice that has been previously submitted to and approved by this Court (it then goes on to list 7 items to be put on the notice)

IT IS FURTHER ORDERED: that henceforth, communications between the Interior defendants, their agents, representatives, employees, officials, and counsel and members of the plaintiff class may proceed only if a Court-approved version of the above-described notice is conspicuously displayed on such communications and then only between the Interior defendants, their agents, representatives, officers, and counsel and plaintiffs' counsel unless the class member with whom communication is sought has waived his or her right to consult class counsel, in which case communication may proceed between the Interior defendants, their agents, representatives, employees, officers, and counsel and the individual class member.

This would appear to prohibit all communications with class members on virtually any subject related to the trust. It could, for instance, mean we cannot send checks out until we either have a waiver or have a court approved notice to go out with each check, we could not hold community meetings or meet with beneficiaries until a court approved notice is provided the beneficiary or they have provided us a written waiver. We have 10 days to provide a draft of such a notice, the court will review and plaintiffs will likely object so it could be some time before this is resolved. For the time being, it is essential that NO communication be held with a class member until further notice. We will be meeting with counsel at noon and 5pm EST to discuss and I will send advisories as soon as available. Thank you for your attention to this very serious matter.

Donna Erwin  
09/30/2004 01:26 PM

To: OST\_DST, OST\_RT, Pat Gerard/OST/OS/DOI@DOI, Debbie  
Meisner/OST/OS/DOI@DOI, Charlene Toledo/OST/OS/DOI@DOI,  
William Becker/OST/OS/DOI@DOI

cc:  
Subject: court order

Here is what we know thus far. Ross please add to this if you have any further word.

As I have communicated to you:

We will hold per capitas payments and get permission from the court on notice to be enclosed  
We will mail daily checks, O&G check with EOPs, EOPs only, ACH and EFT confirmations as always  
We will take collections and post  
We will post receipt & disbursements  
We will take and post maintenance (RFM)

Information I just received from Ross:

No ILCA payments (per Margaret, ILCA has ceased making payments until they receive additional funds)  
We may take telephone calls and give information to walk ins as long as it is informational only  
We may not communicate until a notice is approved by the court on any decisional items. In other words  
we are not to communicate giving advice or asking for decisions on assets.  
We should cancel any scheduled out reach meeting until further notice

Any questions let me know. Thanks for all your patience and help especially on the last day of the year.

Donna Erwin  
Principal Deputy,  
Office of the Special Trustee for American Indians  
505.816.1313 Fax-505.816.1319

### NOTICE # 3

To: Agents, Representatives, Employees, Officers, and Counsel of the U.S.  
Department of the Interior Involved with Indian Trust Matters

Re: Communications with Class Members in *Cobell v. Norton*

#### THIS NOTICE SUPPLEMENTS ANOTHER NOTICE PROVIDED EARLIER THIS WEEK ON THE SAME SUBJECT

In the Notice provided on Monday/Tuesday this week, the final paragraph noted that the court's Order provides that communications "regarding the sale, exchange, transfer or conversion of any individual Indian trust land" can occur once appropriate notice and waiver procedures are established, but **please be aware that such procedures have not yet been established.**

In the absence of these procedures all communications with individual Indian class members regarding the sale, exchange, transfer or conversion of any individual Indian trust land is currently prohibited.

It has come to the Department's attention that a non-government website that may provide selected information to Indian country is currently providing an "AFFIDAVIT" that some individual Indians may assume is sufficient to waive their rights to the court Ordered Notice and their rights to consult with class counsel. **Please be advised that the court has not approved this or any other waiver, therefore it may not currently be accepted.**

The government will be working with the plaintiff's counsel and the U.S. District Court to ensure that the courts Order regarding Notice and rights to consult with class counsel is implemented appropriately. A copy of the aforementioned affidavit is attached for your information.

As described in prior notices, class members are represented by legal counsel (Dennis Gingold at (202) 824-1448 or Keith Harper at (202) 785-4166). Should individual Indian class members wish to discuss or otherwise communicate on matters that are currently prohibited by the court's Orders, please direct them to contact their class counsel.

confused about any affect that the court's most recent Orders may have upon the payment of checks to individual Indians. Please be advised that the court has made it clear that **the Order does not affect** our normal processes of receiving payment checks on behalf of individual Indians, the processing of those checks or the

individual Indians that there is no court-related delays in processing funds.

**NOTE: In an effort to prevent further miscommunication and misunderstandings, BIA Regional Directors and Agency Superintendents should**

I thank you for your continued patience and assistance in complying with the court's Orders. The Department will continue to inform you of new developments. In the meantime, as noted above, you must not make any prohibited communications to a present or former holder of an IIM account. If you have questions about this Notice.





LAN TEAM

10/08/2004 05:58 PM

To:  
cc:  
Subject: DOI Nationwide - NOTICE # 3 Communications with Class Members in Cobell v. Norton

To: Agents, Representatives, Employees, Officers, and Counsel of the U.S. Department of the Interior Involved with Indian Trust Matters

Re: Communications with Class Members in *Cobell v. Norton*

**THIS NOTICE SUPPLEMENTS ANOTHER NOTICE PROVIDED EARLIER THIS WEEK ON THE SAME SUBJECT**

In the Notice provided on Monday/Tuesday this week, the final paragraph noted that the court's Order provides that communications "regarding the sale, exchange, transfer or conversion of any individual Indian trust land" can occur once appropriate notice and waiver procedures are established, but **please be aware that such procedures have not yet been established.**

It has come to the Department's attention that a non-government website that may provide selected information to Indian country is currently providing an

...  
**accepted.**

The government will be working with the plaintiffs' counsel and the U.S. District Court to ensure that the court's Order regarding Notice and right to consult with class counsel is implemented appropriately.

As described in prior notices, class members are represented by legal counsel (Dennis Gingold at (202) 824-1448 or Keith Harper at (202) 785-4166). Should individual Indian class members wish to discuss or otherwise communicate on matters

that are currently prohibited by the court's Orders, please direct them to contact their class counsel.

It has also been brought to our attention that some individuals appear to be confused about any effect that the court's most recent Orders may have upon the payment of checks to individual Indians. Please be advised that the court has made it clear that **the Order does not affect** our normal processes of receiving payment checks on behalf of individual Indians, the processing of those checks or the subsequent payment of funds to individual Indian recipients. **Please utilize your currently established business practices to process Indian funds in an effective and expeditious manner.** In addition, please communicate with and reassure individual Indians that there are no court-related delays in processing funds.

**NOTE: In an effort to prevent further miscommunication and misunderstandings, BIA Regional Directors and Agency Superintendents should discuss these instructions with their staff members and communicate with Tribal governments to ensure this information is conveyed accurately.**

Thank you for your continued patience and assistance in complying with the court's Orders. The Department will continue to inform you of new developments. In the meantime, as noted above, you must not make any prohibited communications to a present or former holder of an IIM account. If you have questions about this Notice, please contact either Rachel Spector ((202) 208-6029) or Kaniah Konkoly-Thege ((202) 208-5132).



WaiverAffidavit.pdf

1. I, \_\_\_\_\_, am an individual Indian trust beneficiary, a member of the \_\_\_\_\_ (state tribe or tribal affiliation), and a member of the class in Cobell v. Norton, Civil Action No. 1:96 CV 01285 (RCL).

2. I am also the beneficial owner of trust land, the legal description of which is \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_.

3. I understand that the Court in Cobell v. Norton has held that "individual Indians

4. Nevertheless, I want to sell this land and hereby waive my right to the information that is required to be provided to me in the Notice that the U.S. District Court has included in the supplementary order that it entered on September 29, 2004 ("Order") "regarding the sale, exchange, transfer, or conversion" of individual Indian trust land. Therefore, I request that the District Court exclude from the scope of the Order the sale of trust land described herein and authorize the Interior Department to communicate with me so that this sale can be completed without delay.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this day, October \_\_, 2004.

\_\_\_\_\_  
NAME

NOTARIZATION:



DUE TO THE SEPTEMBER 29, 2004, COBELL COURT  
ORDER WE CANNOT DISCUSS ANY TRUST  
TRANSACTIONS OR MATTERS AT THIS TIME WITH

CLOSED FOR BUSINESS UNTIL FURTHER NOTICE.  
FOR ADDITIONAL INFORMATION CONTACT THE  
ATTORNEYS FOR THE PLAINTIFF CLASS:

BUSINESS RELATED TO NON-TRUST MATTERS WILL  
CONTINUE.

OCTOBER 1, 2004-ANADARKO AGENCY

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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

DECLARATION OF ROBERT J. WINTER

I, Robert J. Winter, pursuant to 28 U.S.C. § 1746, do declare as follows:

1. I am the Director of the Office of Trust Reporting and Reconciliation at the Office of the Special Trustee for American Indians. My duties and responsibilities include oversight of financial reporting and certain reconciliation processes. I oversaw my staff's preparation of the attached report.
2. The attached report summarizing checks disbursed by date, number and amount, was prepared using the following information and reconciliation procedures:
3. Check disbursement information is from the Daily Disbursement Reports (DDR) prepared by the Deputy Indian Services Special Disbursing Agent (ISSDA) for the days presented. This information is compared to database tables generated directly from system information to ensure the data is accurate. It is this information that is regularly sent to Treasury which updates their Check Payment & Reconciliation (CP&R) system with specific check disbursement data.
4. This information sent to Treasury is also verified, in total, against the SF 1219/1220 reports prepared by OST and remitted to Treasury on a monthly basis. These SF 1219/1220 reports are prepared and remitted independent of the electronic check data (subsequently input into the CP&R


system and reconciled by Treasury) to ensure controls are in place to minimize the risk of fraud, waste, and abuse.

5. The monthly financial statement preparation process also performs an independent reconciliation of all disbursement transactions (EFT, checks, transfers, and disbursements to other agencies) and ensures that the check total equals what was reported on the DDRs and subsequently remitted to Treasury.

6. The three independent reconciliations delineated above, which in turn support and are supported by additional reconciliations, ensure the accuracy of the data in the attached report.

7. Finally, the data presented in this report has been reconciled to our accurate check logs and reviewed by two supervisory accountants prior to issuance.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

  
Robert J. Winter 12/21/04

OFFICE OF THE SPECIAL TRUSTEE FOR AMERICAN INDIANS  
OFFICE OF TRUST REPORTING AND RECONCILIATION  
DAILY ISSDA DISBURSEMENT REPORT  
D. O. SYMBOL 4844, CHECK SYMBOL 4844

SUMMARY OF CHECK DISBURSEMENTS FOR THE PERIOD SEPTEMBER 1, 2004 THROUGH OCTOBER 29, 2004

Check Date	Number of Checks	Cash Disbursement Total
09/01/04	2,315	2,708,060.02
09/02/04	197	907,114.16
09/03/04	430	477,167.79
09/07/04	465	237,340.62
09/08/04	303	372,747.85
09/09/04	1,053	370,532.34
09/10/04	578	422,075.90
09/13/04	602	476,594.14
09/14/04	438	368,101.72
09/15/04	10,048	2,816,635.85
09/16/04	819	515,448.02
09/17/04	672	198,056.93
09/20/04	1,206	331,486.80
09/21/04	1,544	527,488.08
09/22/04	989	287,067.44
09/23/04	1,675	380,280.16
09/24/04	906	310,620.55
09/27/04	1,256	289,840.07
09/28/04	500	626,830.52
09/29/04	7,277	1,467,261.94
09/30/04	3,100	496,603.97
10/01/04	283	70,379.66
10/04/04	136	70,938.05
10/05/04	344	169,273.55
10/06/04	1,320	933,987.45
10/07/04	1,090	349,919.32
10/08/04	360	73,563.48
10/12/04	1,298	896,953.06
10/13/04	7,895	1,676,029.17
10/14/04	2,890	843,171.02
10/15/04	1,295	348,849.63
10/18/04	1,423	598,518.28
10/19/04	1,730	418,837.78
10/20/04	1,625	623,682.72
10/21/04	601	299,081.91
10/22/04	1,630	919,538.09
10/25/04	1,035	210,222.54
10/26/04	1,314	252,531.03
10/27/04	3,618	652,809.34
10/28/04	7,834	1,355,675.52
10/29/04	815	1,598,261.83
<b>Grand Total</b>	<b>74,909</b>	<b>\$ 26,949,778.30</b>

OFFICE OF THE SPECIAL TRUSTEE FOR AMERICAN INDIANS  
OFFICE OF TRUST REPORTING AND RECONCILIATION  
DAILY ISSDA DISBURSEMENT REPORT  
D.O. SYMBOL 4844, CHECK SYMBOL 4844

SUMMARY OF CHECK DISBURSEMENTS FOR THE PERIOD SEPTEMBER 02, 2003 THROUGH OCTOBER 31, 2003

Check Date	Number of Checks	Cash Disbursement Total
09/02/03	2118	\$ 1,974,270.32
09/03/03	349	149,472.17
09/04/03	451	203,021.22
09/05/03	236	185,231.27
09/08/03	552	370,282.25
09/09/03	482	509,849.22
09/10/03	6,646	1,424,997.53
09/11/03	1339	651,601.04
09/12/03	527	113,391.35
09/15/03	622	390,619.51
09/16/03	578	273,052.51
09/17/03	998	280,729.59
09/18/03	275	342,995.64
09/19/03	530	403,565.93
09/22/03	375	211,392.65
09/23/03	983	605,794.87
09/24/03	4825	1,813,244.63
09/25/03	1465	668,105.52
09/26/03	921	530,447.64
09/29/03	9118	1,753,259.22
09/30/03	334	297,132.23
10/01/03	166	134,084.21
10/02/03	371	182,414.63
10/03/03	258	74,483.17
10/06/03	973	394,579.79
10/07/03	845	314,199.02
10/08/03	1598	840,705.08
10/09/03	944	432,742.29
10/14/03	435	208,760.03
10/15/03	3599	1,134,142.50
10/16/03	3540	740,838.78
10/17/03	5562	1,173,755.28
10/20/03	513	282,927.09
10/21/03	1484	384,171.98
10/22/03	3064	560,631.74
10/23/03	1632	351,706.03
10/24/03	1125	359,029.36
10/27/03	1732	355,135.76
10/28/03	460	352,022.67
10/29/03	1330	706,022.13
10/30/03	8328	1,891,904.74
10/31/03	476	175,804.86
<b>Grand Total</b>	<b>72,659</b>	<b>\$ 24,202,587.45</b>



IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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

**ORDER**

This matter comes before the Court on *Defendants' Motion to Reconsider The October 22, 2004 Memorandum Opinion* (Dkt. \_\_\_\_). Upon consideration of the Motion, the responses thereto, and the record in this case, it is hereby

ORDERED that Defendants' Motion is GRANTED;

FURTHER ORDERED that the Court's October 22, 2004 Memorandum Opinion will be reissued with the following three paragraphs (including footnote 3) removed:

It came to the Court's attention that, initially, Interior felt that compliance with the September 29, 2004 Order required Interior to shut down the Bureau of Indian Affairs entirely. Field offices were closed and notices were affixed to their doors explaining that no business could be conducted due to this Court's Order of September 29, 2004; and apparently all live telephone operators were replaced with a recorded message of the same stripe. Most appallingly, the entire process by which payments are made to IIM account holders from lease revenues, royalties, and so forth was similarly shut down. These actions, of course, were taken pursuant to a deliberate, infantile, and frankly ridiculous misinterpretation of this Court's straightforward Order.

Although the Secretary claims that she orally ordered that no payments to Indians be withheld, her initial written instructions to Interior employees were silent on the issue. Further, the tenor of the Secretary's instructions apparently led many employees to hold payments and, in numerous cases, to tell the Indian beneficiaries that their checks were being withheld as a direct result of this Court's

Order. As the Court forcefully explained to the Secretary's counsel at a hearing held by the Court on October 1, 2004, such statements were lies. The Secretary's addition, in her instructions promulgated to Interior on September 20, 2004, of items 2 through 8 on the list of subjects of communications between Interior and Indians restricted by this Court's Order, [FN3] before seeking any clarification from the Court, is yet another example of how the Secretary treats these Indian beneficiaries – one so far beyond the pale that it led the Court to inquire of defense counsel whether the Secretary had "decided to declare war on the Indians that brought this case[.]" Tr. at 9 (Hearing of Oct. 1, 2004).

The Secretary's claim that she was unsure what the Court intended in its September 29, 2004 Order is now, as it was then, totally bogus. What is clear is that the Secretary, in a fit of pique and perhaps anger at both the Court and the plaintiffs for the issuance of the September 29 Order, simply retaliated against the Indian beneficiaries under the thin disguise of a preposterous and facially false "interpretation" of the Court's Order. That this "interpretation" was not crafted in good faith is clear, but the Secretary's motive for her bad faith interpretation and retaliation passes understanding.

FN3. The Secretary's September 30, 2004 instructions to Interior employees indicated that the Secretary believed the Court's September 29, 2004 Order to restrict all communications between Interior and class members regarding: "encumbrances, leasing, lease sales, permitting, rights-of-way, and timber sales of or on individually-owned Indian trust land;" "the investment of trust funds in IIM accounts;" "estate planning, will drafting and the probate of or relating to Indian trust assets;" "the surveying or appraisal of trust assets;" "title to trust lands;" "ownership of trust funds or lands;" or "physical improvement or alteration of trust assets." These subjects, listed as items 2 through 8 in the Secretary's September 30 instructions, were interpreted to fall within the ambit of the Court's September 29, 2004 Order restricting "communications between the defendants, their agents, representatives, employees, officials, or counsel and members of the plaintiff class regarding the sale, exchange, transfer, or conversion of Indian trust land." The Court remains at a loss to understand how such an obviously conceptually bankrupt interpretation of a clearly worded Order could have been swallowed by so many Interior employees without objection. However, this list leaves little doubt why those employees had little choice but to simply shut down the Bureau of Indian Affairs – any words they might have exchanged with any Indian who walked through the door would have violated the Secretary's instructions.

SO ORDERED.

Date: \_\_\_\_\_

\_\_\_\_\_  
ROYCE C. LAMBERTH  
United States District Judge

cc:

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