

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.	)	
	)	

**DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR  
TEMPORARY RESTRAINING ORDER AND FOR PRELIMINARY INJUNCTION**

Defendants oppose Plaintiffs' Motion for a Temporary Restraining Order and for Preliminary Injunction (Aug. 25, 2004) ("Pls.' Mot.") blocking the sale of land owned by individual Indians and communications between the Department of the Interior ("Interior") and the Native American sellers. The bid process about which plaintiffs complain<sup>1</sup> is entirely lawful and proper, having been requested by each individual Indian owner, and in full compliance with applicable regulations. Furthermore, Plaintiffs have failed to demonstrate entitlement to the extraordinary relief they seek. For these reasons, as more fully set out below, Plaintiffs' motion should be denied.

First, this Court lacks jurisdiction to entertain Plaintiffs' motion, because the land sales at issue are a matter of asset management, which this Court has already ruled is not part of this litigation, and because any communications regarding the sales do not violate the Court's Order

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<sup>1</sup> While Plaintiffs' motion seeks to restrain Interior from "selling Individual Indian Trust land," Pls.' Mot. at 1, Plaintiffs' proposed order seeks to "halt the auction of Individual Indian Trust land." In fact, under the relevant regulation an oral "auction" only occurs under certain circumstances after sealed bids are opened. 25 CFR § 152.27(b). The relevant regulations, *id.* §§ 152.17-152.32, appear under the heading "Sales, Exchanges and Conveyances of Trust or Restricted Lands."

of December 23, 2002. Second, Plaintiffs wholly fail to discharge their heavy burden of establishing that any of the four prerequisites for extraordinary relief are satisfied here. Third, Plaintiffs' motion demonstrates on its face that there is a conflict of interest between the movants and those absent class members who desire to sell their interests in allotted Indian lands. In a class action, no extraordinary relief should be granted when evidence exists that some absent class members would oppose the relief sought by the class representatives.

### Facts

The land sales about which Plaintiffs complain in their motion are routine transactions undertaken at the request of the individual Indians who own the properties. As Plaintiffs concede in their motion, individual Indians have a right, guaranteed by statute and regulation, to sell their land.<sup>2</sup> The sale process follows a procedure set out in lawful regulations of the Secretary of the Interior, which are found in 25 C.F.R. Part 152.<sup>3</sup> Any individual Indian may file an application with the Department of the Interior for sale of his or her land. 25 C.F.R. § 152.18. (The natural guardian of an Indian under a disability, *id.* § 152.18, or a duly appointed fiduciary acting with court approval, *id.* § 152.19, may also make an application on behalf of an individual Indian in his or her charge.) In the application, the individual Indian must identify current sources of

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<sup>2</sup> For example, the regulations provide in pertinent part that "trust or restricted lands acquired by allotment, devise, inheritance, purchase, exchange, or gift may be sold, exchanged, and conveyed by the Indian owner with the approval of the Secretary or by the Secretary with the consent of the Indian owner." 25 C.F.R. § 152.17 (citing multiple statutory authorities dating back to 1902).

<sup>3</sup> The governing regulations were adopted in 1973, see 38 Fed. Reg. 10080 (Apr. 24, 1973), and redesignated in 1982, see 47 Fed. Reg. 13327 (Mar. 30, 1982).

income and provide other information in order to satisfy Interior that the requested land sale is in the best interest of the applicant.<sup>4</sup>

Not every bid solicitation will result in a sale. Some parcels do not attract bids.

Declaration of Bruce W. Maytubby ¶ 6 (Aug. 30, 2004) ("Maytubby Decl.") (Exhibit A). For those properties that attract bids, an appraisal is performed to assess the fairness of the bids received. The regulations require Interior to obtain an appraisal before any sale can be approved. 25 CFR § 152.24. If the bids do not exceed the appraised value of the property, the regulations allow acceptance of the high bid only if Interior, with the consent of the land owner, determines that the winning bid "approximates said appraised fair market value and in the Secretary's judgment is the highest price that may be realized in the circumstances." Id. § 152.28(b). The regulations further provide:

The Secretary reserves the right to reject any and all bids before the award, after the award, or at any time prior to the issuance of a patent or delivery of a deed, when he shall have determined such rejection to be in the best interests of the Indian owner.

25 C.F.R. § 152.29.

All of the parcels that are the subject of Plaintiffs' motion were advertised for sale by reason of an application filed by the individual Indian owners. Maytubby Decl. ¶ 3.<sup>5</sup> As

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<sup>4</sup> The regulations provide, in pertinent part as follows: "Applications may be approved if, after careful examination of the circumstances in each case, the transaction appears to be clearly justified in the light of the long-range best interest of the owner or owners . . ." 25 C.F.R. § 152.23.

<sup>5</sup> In support of this Opposition, Defendants are filing a motion for permission to file *ex parte in camera* on August 31, 2004, copies of documentation related to and including the applications. Each application contains personal residential, financial and other details protected from disclosure by the Privacy Act. Defendants therefore seek to submit the applications for *in camera* review in order to permit the Court to consider the totality of the circumstances

demonstrated by the applications, each parcel listed on the invitation to bid submitted by Plaintiffs has a corresponding application from the individual Indian land owner (or owners) specifically requesting the sale. Consistent with the government regulations cited above, Interior would conduct an appraisal if and when bids are received on each parcel. Maytubby Decl. ¶ 7.

### **Argument**

#### **I. This Court Lacks Jurisdiction to Entertain Plaintiffs' Motion.**

##### **A. Plaintiffs Improperly Seek to Expand the Reach of this Case into Asset Management.**

The subject matter of Plaintiffs' motion -- the sale of individual Indian land pursuant to federal regulation -- lies beyond the jurisdiction of this Court. The purported purpose of the motion is to prevent the termination of Interior's fiduciary obligation to the land owner and to "assur[e] that existing land records reflect actual boundaries and true and correct acreage because cadastral surveys are backlogged." Pls.' Mot. at 2. Plaintiffs also allege that the sale, undertaken pursuant to duly adopted regulations, presents a "risk of collusion" in the bidding process. *Id.* at 6. Plaintiffs effectively ask the Court to assume that these accusations, unsupported by any evidence, demonstrate that breaches of trust are being committed by Defendants in their administration of individual Indian lands. Plaintiffs' contentions, however, not only lack foundation, but also exceed the scope of this litigation.

Land sales are matters of asset management, not accounting. The class members in this case are seeking to enforce a statutory right to an accounting; they are not making a claim for mismanagement of trust assets. This Court has already declared that "asset management is not

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surrounding these particular sales and to determine whether and to what extent such personal information should and may be shared with Plaintiffs.

part of this lawsuit." Cobell v. Babbitt, 91 F. Supp. 2d 1, 18 (D.D.C. 1999) (emphasis added).

Thus, the land sales Plaintiffs seek to enjoin are outside the scope of this litigation.

The Court of Appeals has held that the subject matter jurisdiction of the Court in this case rests upon its authority under the APA "to compel agency action 'unlawfully withheld or unreasonably delayed.'" Cobell, 240 F.3d 1081, 1095 (D.C. Cir. 2001). The Court of Appeals further emphasized that the only "actual legal breach" at issue "is the failure to provide an accounting, not [the] failure to take the discrete individual steps that would facilitate an accounting." Id. at 1106. The Court admonished the district court "to be mindful of the limits of its jurisdiction," id. at 1110, noting that the only basis for retaining jurisdiction over the case was to determine whether Interior's actions "would necessarily delay rather than accelerate the ultimate provision of an adequate accounting[.]" Id. The accounting duty is the sole foundation for the Court's jurisdiction and, thus, defines the limits beyond which its orders may not extend.

**B. Plaintiffs Cannot Expand the Court's Jurisdiction or the Subject Matter of this Case by Invoking the Court's Order Limiting Defendants' Communications with Class Members.**

Plaintiffs seek the unjustified expansion of this Court's December 23, 2002 Order limiting certain communications between Defendants and Cobell class members, Cobell v. Norton, 212 F.R.D. 14, 24 (D.D.C. 2002), by asserting that the land sales at issue are not in the "ordinary course of business." Pls.' Mot. at 2. Plaintiffs' argument entirely misses the mark, and it misinterprets the referenced Order.

In its Order of December 23, 2002 ("12/23/02 Order"), this Court directed, in pertinent part, that:

[D]uring the pendency of the instant litigation, the parties to the litigation, their agents and officials, and their counsel shall not communicate, through the United States mail or any other mode of communication, with any class member in this litigation *regarding this litigation or the claims involved therein*, except as specifically permitted by order of this Court. This restriction includes, but is not limited to, any communications that affect the rights of class members to a full and accurate accounting of their Individual Indian Money trust accounts.

The instant Order does not prohibit defendants from communicating with class members in the ordinary course of business on routine matters unrelated to the instant litigation.

212 F.R.D. at 24 (emphasis supplied). The Order's prohibitions are expressly limited to the subject matter of this case: the rights of class members to a full and fair accounting of their IIM accounts. The Order contains no proscription against the communications involved here, which concern asset management, not accounting.

Plaintiffs rest their argument entirely on explanatory language in the Court's Order. As Plaintiffs note, Pls.' Mot. at 7, the Court explained that its prohibition would still permit Defendants "to continue engaging in the regular sorts of business communications with class members that occur in the ordinary course of business." 212 F.R.D. at 20. Plaintiffs wrongly insist that land sales are not in the "ordinary course of business," and so any communication about land sales are prohibited by the Order. However, the Court's order did not, and could not, prohibit any communication between Interior and class members that is not in the ordinary course of business. The prohibited contacts are necessarily those "regarding this litigation and the claims involved therein . . ." Id. at 24. The communications at issue do not involve the right to an accounting, the subject of this litigation, nor do they discuss any aspect of the present suit.

In any event, communications between Interior and IIM account holders on the subject of land sales are in the ordinary course of business. Plaintiffs repeatedly contend that the sales are not in the ordinary course, because class members' rights may be "cut off" by the sales, but that assertion is incorrect. Class membership in this case does not depend upon land holdings but rather upon having an interest in an IIM account. Because the class definition includes former account holders, even if a particular land sale were to result in closure of an IIM account, it would have no effect on class membership.<sup>6</sup>

### C. Other Jurisdictional Flaws in Plaintiffs' Motion.

At least two other reasons exist for concluding that the land sales and communications concerning them are not within the Court's purview. First, Plaintiffs complain about the sale procedure but have offered no proof that any member of the Cobell class is, in fact, injured or threatened with imminent harm by these sales. Absent proof of harm, Plaintiffs have no standing here to seek relief. Lujan v. Nat'l Wildlife Fed., 497 U.S. 871 (1990).

Second, to the extent Plaintiffs are attacking the implementation of the sale regulations,<sup>7</sup> this Court lacks jurisdiction, because the procedure falls within the Secretary's discretion. Norton v. Southern Utah Wilderness Alliance, 124 S. Ct. 2373 (2004) ("SUWA"); Lane v. Anderson, 67 F. 563 (C.C.D. Wash. 1895). Here, it appears that Plaintiffs are attempting to obtain a de facto receivership by placing the Court in the path of all decisions that Interior makes. "Preservation

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<sup>6</sup> Similarly, direct pay arrangements entered into during this litigation – about which Plaintiffs have not complained – may result in the elimination of IIM accounts but likewise not affect class membership.

<sup>7</sup> To the extent Plaintiffs are challenging the sale regulations on their face, such challenge is barred by the statute of limitations. 28 U.S.C. § 2401(a).

of the *status quo* should compel this court to intervene immediately and supervise any such sale until [the Secretary] is replaced by a receiver . . ." Pls.' Mot. at 3. The Supreme Court recently warned against injecting courts into such roles:

The principal purpose of the APA limitations . . . is to protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve. If courts were empowered to enter general orders compelling compliance with broad statutory mandates, they would necessarily be empowered, as well, to determine whether compliance was achieved – which would mean that it would ultimately become the task of the supervising court, rather than the agency, to work out compliance with the broad statutory mandate, injecting the judge into day-to-day agency management.

SUWA, 124 S. Ct. at 2381.

Plaintiffs' motion should be denied because the Court lacks authority to grant the requested relief.

**II. Plaintiffs Have Failed to Establish Any of the Elements Required for Issuance of a Temporary Restraining Order.**

In considering whether to grant an application for a temporary restraining order or a preliminary injunction, this Court must examine: (1) whether there is a substantial likelihood that Plaintiffs would succeed on the merits; (2) whether the Plaintiffs would suffer irreparable injury if the injunctive relief is denied; (3) whether the granting of injunctive relief would substantially injure the other party; and (4) whether the public interest would be served by the granting of the injunctive relief. E.g., Davenport v. Int'l Bhd. of Teamsters, AFL-CIO, 166 F.3d 356, 360-61 (D.C. Cir. 1999) (citing Serono Labs., Inc. v. Shalala, 158 F.3d 1313, 1317-18 (D.C. Cir. 1998)); Kudjodi v. Wells Fargo Bank, 181 F. Supp. 2d 1, 2 n.2 (D.D.C. 2001).

In their motion, Plaintiffs seek an order "that the Interior Defendants and their counsel immediately shall halt the auction of Individual Indian Trust land." Pls.' Proposed Order at 1. They base their request on an assertion that "the Court possesses the duty and the authority to restrict communications that threaten to interfere with [class members'] rights," Pls.' Mot. at 8, relying on the Court's December 23, 2002 Order, *id.* at 6-8. As shown above, the Court does not have jurisdiction to interfere with land sales requested by allotment owners. Yet even if it did, Plaintiffs fail to show that Defendants' handling of Indian land sales violates the December 23, 2002 Order: Interior, by conducting the sales pursuant to federal regulation, is "engaging in the regular sorts of business communications with class members that occur in the ordinary course of business." 212 F.R.D. at 24. Plaintiffs have not and cannot meet the legal requirements for a temporary restraining order or preliminary injunction.

**A. Plaintiffs Have Not Established a Substantial Likelihood of Success on the Merits.**

Contrary to Plaintiffs' assertions, they must establish a substantial likelihood of success on the merits of this dispute concerning communications related to land sales requested by individual Indians. Plaintiffs cannot establish a likelihood of success on the merits of this motion by citing past success in the Phase 1 trial or the Phase 1.5 trial that is presently on appeal.<sup>8</sup> Instead, their burden is to show a substantial likelihood of success on whether Interior may continue to conduct land sales at the beneficiaries' requests pursuant to established federal regulations.

Plaintiffs' motion does not establish a likelihood of success, substantial or otherwise,

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<sup>8</sup> Furthermore, the Court expressly rejected Plaintiffs' Phase 1.5 plan.

because they fail to show that the land sales at issue are improper or that communicating with class members about such sales is not "in the ordinary course of business." Cobell, 212 F.R.D. at 24. Plaintiffs have barely attempted to do so. See Pls.' Mot. at 9-10. Plaintiffs' offer no evidence (1) that these sales are out of the ordinary course of business; (2) offer no evidence that Interior has not followed its lawful regulations in noticing these sales or past sales; and (3) incorrectly complain that a class member who sells land thereby loses the right to an accounting in this case. Tellingly, Plaintiffs concede that the individuals have a right to sell, Pls.' Mot. at 4, and offer no evidence that any individual has complained about past or pending sales.

Plaintiffs' motion not only fails because Plaintiffs cannot show that land sales and related communications are improper, but also because their other arguments are both irrelevant and groundless.

They argue that a sale should not occur without an appraisal. Id. at 5 & n.7. Yet the regulations, of which Plaintiffs' counsel are charged with knowledge, ensure an appraisal after the bids are received. 25 C.F.R. § 152.24. Interior requires an appraisal before allotted land may be sold. Maytubby Decl. ¶ 7. Plaintiffs cite Interior's appraisal backlog, Pls.' Mot. at 5, but if the backlog had any effect in these instances, it would prevent the sale from concluding, and is therefore irrelevant to Plaintiffs' motion.

Plaintiffs argue that Interior must provide "information that . . . each and every affected beneficiary has been informed . . . that [Secretary] Norton would manipulate the sale of such Trust assets in a bad faith effort to cut-off [sic] vested rights and terminate the trustee-delegates' fiduciary obligations, including without limitation the historical accounting duty owed to each beneficiary." Pls.' Mot. at 6. Plaintiffs do not even allude to any evidence to support such a

serious and unfounded charge. As noted above, see n.2 supra, inasmuch as the class definition includes former account holders, a land sale – even if it happened to result in closure of an IIM account – would have no effect on class membership and would not "cut off" any class member's rights in this litigation. In addition, to the extent closure of an IIM account would cause the statute of limitations period to commence, the filing of this action tolled it for class members.

Plaintiffs argue that "there can be no dispute that the sale of Trust assets prior to the completion of an effective data cleanup and correction of Trust records would exacerbate the monumental difficulties that exist today because of generations of malfeasance and neglect . . ." Pls.' Mot. at 9. Yet Plaintiffs offer no evidence to support this claim. They cite no evidence that the records for the allotments being sold are incorrect. They supply no evidence that the record-keeping for the pending sales would be mishandled.

Moreover, as Plaintiffs well know, Interior has conducted sales of allotment interests throughout the course of this litigation. Testimony by numerous witnesses at Trial 1.5 relating to land sales was not only heard but often initiated by Plaintiffs' counsel. See Tr., Phase 1.5 Trial Day 1 PM, at 23:23-24:3 (May 1, 2003) (Plaintiffs' direct examination of former Special Trustee Homan); Tr., Phase 1.5 Trial Day 21 AM, at 53:4-12 (June 4, 2003) (Plaintiffs' cross-examination of Associate Deputy Secretary Cason); Tr., Phase 1.5 Trial Day 23 AM, at 19:2-19 (June 6, 2003) (Defendants' direct examination of Interior contractor-accountant Michelle Herman's testimony about collection of accounting documents "primarily focused on land sales"); Tr., Phase 1.5 Trial Day 39 PM, at 15:3-23 (June 30, 2003) (Plaintiffs' cross-examination of Special Trustee Swimmer, testifying about provisions in Interior's draft Accounting Standards Manual addressing "timely and complete information regarding the gains and losses associated

with the sale of allotment assets"); Tr., Phase 1.5 Trial Day 40 PM, at 32:12-18 (July 1, 2003) (Plaintiffs' cross-examination of Mr. Swimmer, discussing Arthur Andersen report concerning payments to Indians on land sales, including whether or not presently all sales are recorded on the general ledger); and Tr., Phase 1.5 Trial Day 41 AM, at 8-9 (July 2, 2003) (re-direct examination of Mr. Swimmer concerning data cleanup of land sale information).

In addition, Plaintiffs are on notice – and presumably aware through their review of Interior's quarterly status reports to the Court – of the sale of thousands of allotment interests pursuant to the Indian Land Consolidation Act of 2000 and Interior's ongoing Indian Land Consolidation Program ("ILCP"). The goal of the ILCP "is to acquire small fractional interests in trust and restricted lands owned by individual Indians . . . in order to lessen the number of owners." Status Report to the Court Number Thirteen, at 79 (May 1, 2003) ("Status Report 13"). Interior's status reports have stated the number of interests acquired during the three-month reporting period and the cumulative total for the program. See, e.g., Status Report to the Court Number Eighteen, at 53 (Aug. 2, 2004) ("Acquired 14,863 fractional interests during this reporting period, for a cumulative total of 93,184 interests"; Status Report 13, at 80 (The ILCP "[a]cquired 2,203 interests [this quarter for a] total of 53,203 interests through March 2003.")); see also Status Report to the Court Number Ten, at 85 (Aug. 1, 2002); Status Report to the Court Number Eight, at 60 (Jan. 16, 2002) (chart showing "No. of IIM accounts eliminated" totaling 121 over four month period in 2001). The ILCP is a program through which IIM beneficiaries may choose to sell their interests in land, as the Native Americans involved here have elected to do. See Pls.' Mot. at 4 (citing *Youpee* as example of "narrowing unlawfully the scope of the plaintiff class").

Plaintiffs have offered no evidence that any of those transactions were handled incorrectly. And Plaintiffs offer no compelling reason for suddenly and immediately halting all land sales eight years into this litigation.

**B. Plaintiffs Do Not Establish the Potential for Irreparable Harm if Their Motion is Not Granted.**

Plaintiffs' motion provides no specific information to support the assertion that Plaintiffs will suffer irreparable harm if a temporary restraining order is not granted. Indeed, the sellers – whom Plaintiffs purport to represent – have already determined and informed Interior of their desire to sell their land.<sup>9</sup>

**C. The Granting of Plaintiffs' Motion Would Substantially Harm Defendants.**

Plaintiffs' motion seeks to block all sales of trust land and substitute the Court for an agency of the executive branch in the administration of those sales. The institution of such a procedure would substantially impair Defendants' ability to discharge their statutory duties of administration and management of lands in trust, nearly all of which lie in parts of the country far removed from the courthouse in Washington, D.C. Such intervention would certainly increase the cost and time required to effect any land transaction, because the land owners, the potential purchasers, and the Interior employees most skilled in handling these activities are all likely to be situated in these remote locations. Indeed, Plaintiffs cannot offer any assurance that requiring this Court to review every transaction in Washington will not introduce a risk of error or risk of

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<sup>9</sup> Plaintiffs' motion has already caused Interior to cancel the bid invitation at issue (no. 69), see Bureau of Indian Affairs Notice of Cancellation of Advertised Land Sale Invitation No. 69 (Aug. 30, 2004) (Exhibit B); Maytubby Decl. ¶ 3, due to the uncertainty that the sales would be permitted and the timing of notices that must be issued for the sales to proceed.

records loss that equals or exceeds the unsubstantiated risks Plaintiffs complain about in their motion. Thus, if the motion were granted, it would impose new risks and substantial costs to the detriment of the Defendants, not to mention the members of the Plaintiff class who own trust land and want to sell it.

**D. The Granting of Plaintiffs' Motion is Not in the Public Interest.**

Even more significant than the likely harm to Defendants is the probable harm that would be suffered by the Indian land holders and those that seek to purchase those properties. Review by this Court of every land sale advertised for bid would necessarily slow the pace of land sales. Some buyers may be driven away because they are unwilling to wait for approval, while others may offer lower prices for land if they know the deal may take much longer to conclude. Some of the parcels are difficult to sell in the first place and so discouraging a willing buyer by making him wait could prove to be the only "irreparable" harm these land owners face regarding this motion. Therefore, Plaintiffs' motion should be denied.

**III. Plaintiffs' Motion Reveals a Conflict of Interest Among Class Members Regarding Land Sales, Which Prevents This Court From Granting the Relief Sought.**

Plaintiffs have asked this Court to intervene and restrain the sale of individual Indian land. Plaintiffs openly acknowledge, however, that a "class member has a right to sell his or her property" and contend that "Plaintiffs do not seek in anyway [sic] to infringe on this right," Pls.' Mot. at 4, but this is precisely what Plaintiffs' motion seeks to accomplish. In their form of order, Plaintiffs propose that the Court order Interior to "immediately . . . halt the auction of Individual Indian Trust Land." Pls.' Proposed Order at 1. Plaintiffs' own motion establishes that some absent class members want to sell, and are actively trying to sell, their land, a position in direct conflict with the aims of the instant motion. The motion, therefore, reveals a conflict of interest

between the class representatives and at least some portion of the absent class. This Court has a duty to protect the interests of absent class members and should deny a motion when granting it would be contrary to the interests of absent class members.

"Inherent in any class action is the potential for conflicting interests among the class representatives, class counsel, and absent class members." Maywalt v. Parker & Parsley Petrol. Co., 67 F.3d 1072, 1077 (2d Cir. 1995). "The interest of lawyer and class may diverge, as may the interests of different members of the class. . . ." Plummer v. Chem. Bank, 668 F.2d 654, 658 (2d Cir. 1982) (internal quotation marks omitted). Both class representatives and class counsel have responsibilities to absent members of the class. National Ass'n of Reg'l Med. Programs, Inc. v. Mathews, 551 F.2d 340 (D.C. Cir. 1976).

Class actions involve the delegation of authority to a named representative to pursue a common goal. In this pursuit, it is not only the duty of the class representative to ensure that the absent members' interests are adequately protected; it is also a responsibility that the process of class adjudication as a whole must shoulder.

*Id.* at 346. Indeed, under Rule 23, the court cannot even properly certify a class action unless it is satisfied that the representative plaintiffs "will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). Thus, when a conflict arises among class members, the Court must take care to avoid an action that favors one segment of the class over others.

It is controlling law in this Circuit that "[r]esponsibility for ensuring adequacy of [class] representation must devolve first of all on the trial court since it is the only person in a position to objectively assess the typicality of interests between the named representatives and the absent class members." Mathews, 551 F.2d at 346 n.31. There is a constitutional due process concern underlying this duty:

[u]nless the relief sought by the particular plaintiffs who bring the suit can be thought to be what would be desired by the other members of the class, it would be inequitable to recognize plaintiffs as representative, and a violation of due process to permit them to obtain a judgment binding absent plaintiffs.

Dierks v. Thompson, 414 F.2d 453, 456 (1st Cir. 1969), quoted in Mathews, 551 F.2d at 346.

Thus, it would be plain error for this Court to entertain the instant motion when the very terms of that motion indicate that the absent class members most directly affected by the requested restraining order would likely not support the motion. In light of this class conflict, the motion should be denied.

### Conclusion

For the foregoing reasons, Plaintiffs' Motion for a Temporary Restraining Order and For Preliminary Injunction should be denied.

Dated: August 30, 2004

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on August 30, 2004 the foregoing *Defendants' Opposition to Plaintiffs' Motion for Temporary Restraining Order and for Preliminary Injunction* was served by Electronic Case Filing, and on the following who is not registered for Electronic Case Filing, by facsimile:

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/s/ Kevin P. Kingston  
Kevin P. Kingston

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 BRUCE W. MAYTUBBY**

1. I, Bruce W. Maytubby, currently serve as a Deputy Regional Director for Trust for the Bureau of Indian Affairs of the Department of the Interior ("Interior") for the Southern Plains Regional Office in Anadarko, Oklahoma. I submit this Declaration in support of Interior's opposition to the Plaintiffs' Motion for Temporary Restraining Order and for Preliminary Injunction.
2. I have devoted my entire career with Interior to the field of Indian real property management. Since 1977, I have worked for the Bureau of Indian Affairs in various capacities and at various locations. From 1977 through about December 1988, I held various Indian land management positions in Washington, D.C., Utah, Wyoming and Arizona. From about December 1988 to approximately July 2004, I served as the Regional Realty Officer for the Southern Plains Regional Office in Anadarko, Oklahoma, until I was promoted to my current position. Based on my work experience, I am familiar

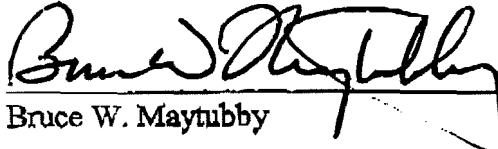
with the process of selling land by bid solicitation at the request of individual Indian land owners pursuant to 25 C.F.R. Part 152.

3. I have also had an opportunity to review the Plaintiffs' motion, referenced above, and to read the copy of "Invitation No. 69," a document attached as an exhibit to the motion. I have also had an opportunity to make inquiries concerning the circumstances surrounding Invitation No. 69. Based upon my inquiry, it is my understanding that the 26 parcels of land identified in that document were approved by Interior upon application by the individual Indian owners of the identified parcels. I have also been informed that the parcel identified as item No. 13 on that list was subsequently withdrawn from sale by the owner or owners. I have also been informed that the Invitation No. 69 itself has been canceled and that a new invitation for bids will probably be issued at a later date.
4. Land transactions such as those reflected in Invitation No. 69 occur fairly routinely in my Region. In the case of the parcels offered by Invitation No. 69, these were advertised for sale at the request of the individual Indian land owners. In the ordinary course, an individual Indian land owner completes a written application asking for the property to be sold. The application form contains questions asking the applicant to identify his or her sources of income and to describe what he or she intends to do with the sale proceeds if a sale is successful. Although I have not had an opportunity to review each individual written application covered by Invitation No. 69, I have been informed that Interior is preparing to submit a copy of these applications for the Court to review. It is also my understanding that these applications were approved in the ordinary course of Interior's business.

5. The bid process follows a procedure set out in regulations found in 25 C.F.R. Part 152. Any individual Indian may file an application with the Department of the Interior for sale of his or her land. 25 C.F.R. § 152.18.
6. The regulations, at 25 C.F.R. § 152.23, provide that "[a]pplications may be approved if, after careful examination of the circumstances in each case, the transaction appears to be clearly justified in the light of the long-range best interest of the owner or owners . . . ." It has been my experience that even when an application is approved, and a parcel is advertised for sale, that sometimes the owner withdraws the property from the bid process. Sometimes no bids are made for a parcel, and sometimes the bids are too low to be found acceptable.
7. The regulations require Interior to obtain an appraisal before any sale can be approved. In my experience, appraisals are usually performed after a property has received a bid but before the sale is approved. This is the procedure I would expect to occur with respect to the parcels listed in Invitation No. 69 had it not been canceled.
8. If a bid does not exceed the appraised value of a parcel, the regulations, at 25 C.F.R. § 152.28(b), allow acceptance of an otherwise winning bid only if Interior, with the consent of the land owner, determines that the bid "approximates said appraised fair market value and in the Secretary's judgment is the highest price that may be realized in the circumstances."
9. The individual Indian land owner can usually withdraw his parcel from sale before title passes, and the regulations allow Interior to reject any and all bids before the award, after the award, or at any time prior to the issuance of a patent or delivery of a deed, when

Interior determines that best interests of the Indian owner, as stated in 25 C.F.R. § 152.29,  
call for rejection of the bid.

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

  
Bruce W. Maytubby

Dated: AUGUST 30, 2004

08/30/2004 16:40 FAX 405 247 2905  
AUG. 30, 2004 12:55PM

BIA SPRO REALTY

003  
No. 1987 P. 2

Notice: The Bureau of Indian Affairs, Anadarko Agency, Advertised Land Sale

Invitation #69 scheduled for September 1, 2004 at 10:00 A.M. is hereby cancelled.

Bidders may pick up their sealed bids.

Beth B. Tippeconie 8-30-04  
Betty B. Tippeconie Date  
Superintendent

**EXHIBIT B**  
Defendants' Opposition to Plaintiffs'  
Motion for Temporary Restraining  
Order and for Preliminary Injunction

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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

**ORDER**

This matter comes before the Court on *Plaintiffs' Motion for Temporary Restraining Order and for Preliminary Injunction*. [Dkt. #2646] Upon consideration of the Plaintiffs' Motion, Defendants' Opposition, and any Reply thereto, and the entire record of this case, it is hereby

ORDERED that the Motion is, DENIED.

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Hon. Royce C. Lamberth  
UNITED STATES DISTRICT JUDGE  
United States District Court for the  
District of Columbia

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

cc:

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