

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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ELOUISE PEPION COBELL, *et al.*, )  
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 Plaintiffs, ) Civil Action No. 96-1285 (RCL)  
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 )  
 v. )  
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 GALE A. NORTON, *et al.*, )  
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 )  
 Defendants. )  
 )

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**DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR  
EXPEDITED CLARIFICATION OR, IN THE ALTERNATIVE,  
MODIFICATION OF THE DECEMBER 23, 2002 ORDER TO FACILITATE  
IMPLEMENTATION OF SETTLEMENT IN *ASSINIBOINE & SIOUX TRIBES OF THE  
FORT PECK RESERVATION v. UNITED STATES***

**INTRODUCTION**

Defendants' Motion For Expedited Clarification Or, In The Alternative, Modification Of The December 23, 2002 Order To Facilitate Implementation of Settlement in Assiniboine & Sioux Tribes of the Fort Peck Reservation v. United States ("Motion"), filed August 6, 2004, explains that the United States has entered into a settlement in Assiniboine & Sioux Tribes of the Fort Peck Reservation v. United States, No. 773-87L (Cl. Ct. 1987) (hereinafter "Fort Peck"), in which the Court of Federal Claims ("CFC") has approved a Stipulation for Certification of Class, for Distribution of Award, and for Entry of Final Judgment ("2001 Stipulation"), certified an opt-out class of individuals eligible to participate in the settlement ("Fort Peck Class"), and directed that the parties are to mail notices, executed by the CFC, to class members ("CFC Communications"). The Motion further explains that because the Fort Peck Class includes individual Indians who are also members of the Cobell class, the

government seeks clarification that Interior would not violate the Court's December 23, 2002 Order ("December Order") by communicating with Fort Peck Class members in the context of the implementation of the CFC-approved settlement of the Fort Peck case, including but not limited to mailing the notice of the class action settlement to the members of the Fort Peck Class.

In their Opposition To Defendants' Motion Seeking Modification Of This Court's December 23, 2002 Order Prohibiting Unauthorized Communication With Class Members ("Opposition"), filed August 20, 2004, Plaintiffs contend that the government should have sought the Court's approval for sending the notices, rather than clarification or modification of the December Order; should have agreed to include certain information about this case in the proposed mailings, and should have explained any res judicata effect that the Fort Peck Case may have on claims in this case. These objections must fail.

As explained in Defendants' Motion and further below, clarification (or modification) of the December Order is the appropriate relief to be sought and granted here because Interior's communications with members of the Fort Peck Class, such as mailing of court-executed notices under the supervision of the CFC, are not properly within the scope of the December Order or this Court's approval. Similarly, the relief sought cannot be denied simply because Plaintiffs wish to have additional information included with the CFC notices, as this Court lacks authority to specify the content of the CFC Communications. Moreover, consistent with principles of judicial comity, this Court should not interfere with the CFC's exercise of its own authority to supervise communications with members of the Fort Peck Class. Finally, the projected res judicata effect of the Fort Peck settlement has no bearing on the pending motion, both because the res judicata effect, regardless of its scope, would not be a valid basis for deciding Defendants' motion, and, more importantly, because a determination of that

effect is premature. Accordingly, Defendants respectfully request that their Motion be granted so that Interior may proceed promptly to send out the CFC-executed notices to the Fort Peck Class.

## ARGUMENT

### **I. Plaintiffs' Objections To Interior's Communications With the Fort Peck Class Are Without Merit.**

#### **A. The December Order Does Not Extend To The Communications At Issue Here.**

Plaintiffs' first objection – that the requested clarification or modification of the December Order will “eviscerate” the protections provided by that order, Opposition at 2, is unsupportable. As explained in Defendants' Motion, the communications for which we seek relief are communications of the CFC and other communications involved in implementation of a settlement for money damages in the CFC. Motion at 4. With respect to the CFC-executed notices, Interior's role is to perform the mailing. Plaintiffs ignore these significant facts and provide no rational explanation of how the grant of Defendants' motion clearing the way for these communications could in any way weaken the December Order. For that reason alone, Plaintiffs' Opposition to the Motion should be rejected.

Moreover, Plaintiffs' Opposition reveals a basic misunderstanding of the scope of the December Order as it relates to the communications at issue here. Under well-settled jurisdictional principles, the scope of the December Order cannot be construed to extend beyond the confines of this case. The December Order, which was aimed at unsupervised communications by Interior "regarding this litigation or the claims involved therein," Cobell v. Norton, 212 F.R.D. 14, 24 (D.D.C. 2002) (emphasis added), should have no application at all to communications that Interior may carry out under the supervision of another court in another case. It was only out of an abundance of caution that

Defendants were prompted to seek clarification (or modification) that the December Order does not prohibit such communications. Thus, Plaintiffs' contention that the relief requested here would somehow weaken the December Order is baseless; the Order would not be weakened because it simply does not apply to the communications at issue.

For similar reasons, there is no merit to Plaintiffs' contention that Defendants should have sought this Court's approval allowing Interior to mail notices pursuant to the CFC's order, as Interior has sought approval in the past for mailing of historical accountings to members of the Cobell class. Opposition at 2, 4-6. Here again, Plaintiffs fail to appreciate the critical distinction between the communications at issue here and those for which Interior has sought approval from this Court in the past. The communications at issue here are communications conducted under the supervision of another court in another case (which was filed before this case). There is no basis for construing the December Order to require Interior to obtain this Court's approval in order to comply with the orders of another court. Moreover, it has long been recognized that courts must exercise care to avoid interference with each other's affairs. See, e.g., West Gulf Maritime Assoc. v. ILA Deep Sea Local 24, 751 F.2d 721, 728-29 (5th Cir. 1985) (holding that district court abused its discretion in issuing a preliminary injunction in light of a previously filed action involving the same issue in another court); Common Cause v. Judicial Ethics Comm., 473 F. Supp. 1251, 1253 (D.D.C. 1979) ("When a court is confronted with an action that would involve it in a serious interference with or usurpation of [another court's] continuing power, considerations of comity and orderly administration of justice demand that the nonrendering court should decline jurisdiction." (quoting Mann Mfg., Inc. v. Hortex, Inc., 439 F.2d 403, 408 (5th Cir. 1971)) (internal quotation marks omitted)). Under such principles, this Court should

avoid interfering with the CFC's exercise of its own jurisdiction, and therefore should not "approve" or "disapprove" Interior's compliance with the CFC's orders.

At bottom, Plaintiffs' concerns that members of the Fort Peck class will be adversely affected by the communications at issue ring hollow. The communications are under the supervision of another court and the Fort Peck Class is well represented by counsel. In the face of these facts, Plaintiffs utterly fail to substantiate their concerns that class members will be adversely affected by the communications. By contrast, the CFC, the Defendants, and the Fort Peck Class all will be adversely affected if the orderly implementation of the Fort Peck settlement is derailed by Plaintiffs' unwarranted opposition to the requested relief.

**B. This Court Lacks Authority To Specify the Content of the CFC Communications.**

Plaintiffs also object to the clarification of the December Order sought by Defendants on the ground that the CFC Communications will not include the specific language that this Court has ordered be included in Interior's transmittal of accountings to Cobell class members. Opposition at 6-7. Here again, Plaintiffs have failed to recognize the crucial distinctions between the CFC Communications and the communications that Interior has conducted with class members concerning historical accountings of their trust fund accounts. For the same reason that this Court is constrained from approving or disapproving Interior's compliance with the CFC's orders, see Section I.A., supra, it cannot specify the content of the CFC Communications, or otherwise require the CFC to modify its orders. This Court must decline Plaintiffs' invitation to become involved in decisions about the content of communications conducted in the Fort Peck case under the supervision of that court.

**C. The Res Judicata Effect Of the Fort Peck Settlement Is Irrelevant To The Request For Clarification.**

Defendants' Motion explains that the Fort Peck settlement resolved “all claims arising out of interest earned on [plaintiffs’] trust funds while those funds were held in Special Deposit or other suspense accounts through September 30, 1981, the IMPL-Agency accounts and the disposition of funds in IMPL-Agency accounts” under certain statutes. Motion at 3. The Motion further explained that “[t]o the extent that the complaint might be read to include any other trust fund claims, such claims are dismissed without prejudice.” Id. Despite that information, Plaintiffs oppose Defendants’ Motion on the ground that Defendants should be required to provide a more detailed explanation of what claims are being settled and what the res judicata effect will be on claims in this case. Opposition at 7-8. These arguments are meritless.

First, the res judicata issue is irrelevant to resolving the issues presented in the Defendants’ Motion. As explained above, the Motion must be granted because the December Order does not properly extend to the communications at issue here.

Furthermore, it is premature to determine the res judicata effect of the Fort Peck Settlement on claims in Cobell, beyond the information about the settlement already provided and set forth in the settlement documents that have been provided to Plaintiffs and this Court. Fort Peck is not final, and not even the court in Fort Peck can determine at this time the res judicata effect that settlement will have on subsequent proceedings. See, e.g., Thompson v. Jones, 992 F.2d 187, 190 (8<sup>th</sup> Cir. 1993) (“The res judicata effect of a judgment can only be determined in a subsequent proceeding . . . after the first proceeding has concluded and judgment has been entered.”). At this time, there is not, and cannot be,

any concrete issue to be decided by this Court or the court in Fort Peck concerning any res judicata effect that the Fort Peck settlement may have on claims in Cobell. See, e.g., In re IKON Office Solutions, Inc. Sec. Litig., 194 F.R.D. 166, 186 (E.D. Pa. 2000) (concluding that any advance determination of the res judicata effect of a proposed settlement would be speculative). Plaintiffs' attempt to make that determination a condition of this Court's approval of Defendants' motion must fail.

**CONCLUSION**

For the foregoing reasons, as well as those stated in Defendants' Motion, Defendants respectfully move this Court, on an expedited basis, for clarification to facilitate implementation of the Fort Peck settlement. In the alternative, if this Court determines that implementation of the settlement would violate the December Order, Defendants request that the December Order be modified to permit the Tribe and Interior to carry out their Settlement Agreement.

Dated: August 30, 2004

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on August 30, 2004 the foregoing *Defendants' Reply in Support of Motion for Expedited Clarification or, in the Alternative, Modification of the December 23, 2002 Order to Facilitate Implementation of Settlement in Assiniboine & Sioux Tribes of the Fort Peck Reservation v. United States* was served by Electronic Case Filing, and on the following who is not registered for Electronic Case Filing, by facsimile:

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