IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	
Plaintiffs,	No. 1:96CV01285 (Judge Robertson)
v.	
DIRK KEMPTHORNE, Secretary of the Interior, et al.,	
Defendants.	

DEFENDANTS' MOTION TO RESCIND OR, IN THE ALTERNATIVE, TO AMEND THE CLASS COMMUNICATION ORDERS

BACKGROUND

The Court has relied upon Rule 23(d) of the Federal Rules of Civil Procedure to enter three orders regarding communication with class members. On December 23, 2002, the Court prohibited the parties, their agents, and their counsel from communicating with any class member regarding the litigation or the claims involved therein. The Court exempted ordinary course of business communications, unrelated to the litigation, from this communications ban.

On September 29, 2004, the Court supplemented the December 23, 2002 Order to prohibit all written land sales communications with class members, absent language prescribed by the Court. Finally, on July 12, 2005, the Court modified the December 23, 2002 Order to vacate the ordinary course of business exception, and to require that all written communications between Interior and the class members contain language prescribed by the Court. The Court of Appeals vacated the July 12, 2005 Order on July 11, 2006.

The original December 23, 2002 class communication order, and the September 29, 2004 and July 12, 2005 supplemental orders, all had the same purpose, according to the Court:

to protect the substantive rights of the class members in this litigation. The Court's expressed purpose in the December 23, 2002 Order was to protect the right of class members to an accounting. The September 29, 2004 Order purported to protect the right of class members to receive information before they entered into a land sale. The July 12, 2005 Order purported to protect the right of class members to receive reliable information before they made decisions that might materially affect their trust interests.

In vacating the July 12, 2005 Order, the Court of Appeals held that Rule 23(d) may appropriately be used to protect the rights of class members to participate in their lawsuit, but that Rule 23 does not authorize orders protecting the substantive rights at issue in the litigation. Because this ruling negates the rationale for the Court's first two class communication orders, they should be rescinded. But even if the Court elects to retain these class communication orders, they are over broad and should be amended to permit Interior to send notices, and conduct consultation, regarding proposed rulemaking.[1]

DISCUSSION

I. The December 23, 2002 Ban on Class Communications

In October 2002, the Department of the Interior mailed 1,208 historical statements of account that had been prepared for IIM judgment account holders. A cover letter accompanying the account statements (attached as Exhibit A) informed account holders, among other things, "If you do not challenge the historical account statement or request an extension within 60 calendar days of the postmark on the envelope containing this letter, the enclosed Historical Statement of Account will be final and cannot be appealed." The letter

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[1] Defendants' counsel conferred with Plaintiffs' counsel about this motion, but could not reach agreement.

made no reference to this case, much less to the release or satisfaction of any claims pending in this case, including the right to whatever form of historical accounting is ultimately provided to the account holders.

In a Memorandum Opinion dated December 23, 2002, the Court concluded that Interior Defendants had acted improperly by sending out statements to account holders that "have the effect of extinguishing the class members' rights to a full and accurate accounting after the defendants have 'fixed the system.'" Cobell v. Norton, 212 F.R.D. 14, 17 (D.D.C. 2002). The Court found that "the defendants engaged in communication with individual class members, the effect of which was to extinguish the very rights of the class members that were at issue in the ongoing class action." Id. at 18. The Court stressed that it did not "find objectionable the fact that defendants mailed statements of account to individual class members," id. at 19, but held that it was "improper" for the Interior Defendants to send "notices to individual class members that have the effect of extinguishing the rights of those class members without first seeking the approval of this Court," id.

Because Interior planned to send additional statements, which the Court found would also "impinge upon the rights of the class members who receive them to a full and accurate accounting," the Court decided that it "must frame a remedy that will protect the rights of these class members." Id. at 20. The Court concluded that it must prohibit Defendants "from contacts with any class members during the pendency of this litigation that discuss this litigation, or the claims that have arisen therein, without the prior authorization of this Court." Id.

The Court expressly stated in its memorandum that Interior could continue "engaging in the regular sorts of business communications with class members that occur in the ordinary

course of business." Id. at 20. The Court did not find such communications "objectionable because they do not purport to extinguish the rights of the class members in this litigation." Id.

On January 8, 2003, Defendants filed a Motion for Reconsideration of the December 23, 2002 Order (Dkt. No. 1715). In that motion, Defendants argued that the Court's premise in the December 23, 2002 Order – that the language in the cover letter operated to extinguish a class member's right to an accounting – was factually and legally in error. First, the only language that could arguably be construed to "extinguish" any claims related, on its face, only to the administrative claims process to challenge the accuracy of the accounting statements provided. That process did not supersede any proceeding under which the Court might ultimately conclude that a new or different accounting might be required. See Interior Defendant's Motion for Reconsideration of Order Prohibiting Communications with Class Members (Dkt. No. 1715), at 9.

Second, the class in this case was certified under Fed. R. Civ. P. 23(b)(1) and (b)(2) – provisions applicable solely to claims for general injunctive relief. Because this is an APA suit to vindicate the collective rights of class members to an accounting, not an action for individual damages under Rule 23(b)(3), class members have no notice and opt-out rights. Thus, a class member could not "settle" an individual claim in any way that could jeopardize the Court's authority to compel an historical accounting to benefit all class members. Also, the availability of any remedy in this litigation depends solely on membership in the class and so long as an individual is a class member, he or she cannot be involuntarily opted out of the litigation. Motion for Reconsideration at 9-11.

The Court denied the Motion for Reconsideration on March 3, 2003. Cobell v. Norton, 213 F.R.D. 33 (D.D.C. 2003). The Court reiterated its conclusion that "defendants mailed

notices to class members that affected the rights of the class members to a full and accurate accounting – the very claims that lie at the heart of Phase II of this litigation."[2] Id. at 35.

II. The September 29, 2004 Land Sales Order

On September 29, 2004, the Court entered a Rule 23(d) order supplementing the December 23, 2002 class communication order because it concluded in an accompanying Memorandum Opinion that Interior's communications with class members regarding land sales "present a sufficient likelihood of serious interference with the rights of plaintiff class members to warrant a Rule 23(d) order imposing conditions on those communications." Cobell v. Norton, 225 F.R.D. 41, 51 (D.D.C. 2004). The Court reiterated that the "rationale for the entry of [the December 23, 2002] order was to prevent Interior from impinging upon the rights of class members to a full and accurate accounting." Id. According to the Court, "[t]he central concern of the 2002 Order, and of this litigation generally, is to guarantee that Interior adheres to its fiduciary duties, and to ensure that trust beneficiaries receive the full value of conscientious behavior by their Trustee-Delegates." Id. at 52 (quotation marks omitted).

The Court reasoned that "[t]o allow beneficiaries to continue to make decisions that substantially alter their trust interests without information about this litigation and Interior's

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[2/] On May 28, 2003, the Court ruled that Interior may send historical statements of account to account holders, but only if prescribed notice language is included, and only after Interior submits samples to the Court for approval. See Order of May 28, 2003 (Dkt. No. 2587). The Court also required Interior to send prescribed notices to the 1,208 account holders who had already received statements, after submitting a sample notice to the Court for approval. Id. On October 22, 2004, the Court authorized Interior to mail 17,096 historical statements of account and the 1,208 notices, on the condition that the mailings contain notice language specified in the Order (which modified notice language in the May 28, 2003 Order). The Court made clear that no future mailings could be made without first being submitted to the court for approval, and that all future submissions must contain: (1) a sample of the transmittal letter to be mailed; (2) a sample historical statement of account; and (3) the exact number of historical statements and transmittal letters Interior plans to send out.

obligations is to effectively rob those beneficiaries of the cash value of their rights." Id. at 52 (emphasis in original). The Court noted that "there can be no meaningful right to an accounting without the more fundamental right to make informed decisions when disposing of trust corpus." Id. (emphasis in original). The Court found, therefore, that "any beneficiary who decides to sell trust land without being informed about this litigation and the accounting that Interior has been ordered to produce is always and already stripped of the very rights that the accounting was ordered to protect." Id. at 53.

The Court supplemented the December 23, 2002 Order 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.

Order of September 29, 2004 (Dkt. No. 2708).[3]

III. The July 12, 2005 Order

At one of the conferences following entry of the September 29, 2004 Order, the Court "invited additional briefing concerning whether communications between Interior and Indian beneficiaries beyond those related to land sales should be subject to a broader Rule 23(d) order." Cobell v. Norton, 229 F.R.D. 5, 12 (D.D.C. 2005), vacated, Cobell v. Kempthorne,

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[3] On October 1, 2004, the Court clarified a separate provision in the September 29, 2004 Order, by limiting its impact to land sales communications. Order of October 1, 2004 (Dkt. No. 2713). On October 22, 2004, the Court further clarified the September 29, 2004 Order in several respects, including to specify that it does not apply to oral communications. Cobell v. Norton, 224 F.R.D. 266, 288 (D.D.C. 2004). On November 17, 2004, the Court clarified the specifics regarding the notice and waiver forms and procedure applicable to all written land sales communications. Cobell v. Norton, 225 F.R.D. 4 (D.D.C. 2004).

455 F.3d 317 (D.C. Cir. 2006). In Plaintiffs' motion responsive to this invitation, they asked for additional Rule 23(d) relief, arguing that "all communications from Interior to Indian beneficiaries containing IIM trust-related information threaten to extinguish the recipients' rights as members of the plaintiff class." Id. On July 12, 2005, the Court granted Plaintiffs' motion, finding that the "Court agrees with plaintiffs, and will order that Interior include a modified version of the plaintiffs' proposed notice with all written communications from Interior to current and former IIM account holders at Interior's expense." Id. at 13.

In its July 12, 2005 Memorandum Opinion, the Court concluded that:

> communications from Interior threaten class members' right to make fully informed decisions about their trust assets. Thus, all communications from Interior to class members containing information on which a class member might base a trust-related decision violate the [December 23, 2002] class communication order for the same reason that land-sales-related communications were found to violate the class communication order. For this reason, the Court will again supplement the class communication order to require that henceforth every written communication from Interior to current and former IIM account holders must contain a notice designed to protect the rights of the class.

229 F.R.D. at 16.

The Court found that the "functional effect" of this relief would be "to eliminate the 'ordinary course of business' exception" from the December 23, 2002 class communication Order. Id. Indeed, in the accompanying Order, the Court expressly "vacated" the language from the December 23, 2002 Order that had permitted ordinary course of business communications. See id. at 23.

IV. The Court of Appeals Decision Negates the Court's Rationale Supporting the Class Communication Orders

A. The July 11, 2006 Decision

On July 11, 2006, the D.C. Circuit vacated the Court's July 12, 2005 class communication Order, holding that Rule 23(d) did not authorize the relief granted. The D.C. Circuit's decision also invalidates the remaining two Rule 23(d) class communication orders.

Preliminarily, the Court of Appeals found that Rule 23(d)(3), by its express terms, only authorizes "conditions on representative parties or on intervenors," Fed. R. Civ. Proc. 23(d)(3), not on defendants. 455 F.3d at 323. The District Court's reliance on Rule 23(d)(3) to support the July 12, 2005 Order thus was "flawed." Id.

This Court similarly improperly relied on its Rule 23(d)(3) authority to support the December 23, 2002 and September 29, 2004 Orders. See 212 F.R.D. at 19; 225 F.R.D. at 48. Under the D.C. Circuit's July 11, 2006 decision, Rule 23(d)(3) authority for these orders does not exist.

Next, the Court of Appeals found that Rule 23(d)(2) "contemplates not substantive relief . . . but only notice of procedural matters." 455 F.3d at 324; see also Fed. R. Civ. Proc. 23(d)(5) ("the court may make appropriate orders . . . dealing with similar procedural matters"). "Rule 23(d)(2) authorizes notice to protect class members' right to participate in the litigation; it does not authorize substantive orders protecting the very rights class members seek to vindicate." 455 F.3d at 324-25. "Because the July 12 order seeks to protect substantive rights and inflicts substantive harm on Interior, it falls outside Rule 23(d)(2)'s scope."[4] Id. at 325.

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[4] Rule 23(d)(2) provides authority for the Court to make appropriate orders "requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action." Fed. R. Civ. P. 23(d)(2).

As discussed above, the Court was quite clear that its December 23, 2002 order was designed to protect the class members' substantive rights. The Court repeatedly stressed that a class communication order was needed to protect the class members' right to an accounting. See Cobell v. Norton, 212 F.R.D. at 17-20. The Court repeated this rationale for the December 23, 2002 Order in the opinions accompanying its two supplemental class communication orders. See 225 F.R.D. at 51, 52; 229 F.R.D. at 11. Under the July 11, 2006 decision of the Court of Appeals, the December 23, 2002 Order falls outside Rule 23(d)(2)'s scope because it seeks to protect a substantive right.

The Court was equally clear that its September 29, 2004 Order was designed to protect the class members' substantive rights. In both language and reasoning quite similar to that later employed in the July 12, 2005 Memorandum Opinion, the Court found that it needed to supplement the December 23, 2002 Order to protect the class members' right to receive trust information before selling their land. 225 F.R.D. at 52-53. Under the D.C. Circuit's July 11, 2006 decision, the September 29, 2004 Order also falls outside Rule 23(d)(2)'s scope because it seeks to protect a substantive right.

The D.C. Circuit's decision that Rule 23(d) authorizes only orders to protect class members' procedural rights to participate in the litigation is consistent with the two seminal cases discussing the proscription of communications with class members – as opposed to court prescription of notice to class members. In Gulf Oil Co. v. Bernard, 452 U.S. 89 (1981), the defendants in a racial discrimination class action persuaded the trial court to enter an order restricting communications with any actual or potential class member, without the prior approval of the court. 452 U.S. at 96. The defendants were concerned that plaintiffs' lawyers were "stirring up" litigation and using the communications to solicit potential class members to

swell the size of the class and prevent potential class members from signing releases under an EEOC conciliation agreement. See id. at 93-94, 100 n.11. The plaintiffs claimed that the communications order interfered with their efforts to inform potential class members of the existence of the lawsuit, and was especially pernicious because the employees were being pressed to decide whether to accept a settlement offer that would release all claims to be decided in the class action. Id. at 102. The Supreme Court struck down the communications ban as an abuse of discretion and ruled that any order limiting communications should be "based on a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties." 452 U.S. at 102.

In Kleiner v. First National Bank of Atlanta, 751 F.2d 1193 (11th Cir. 1985), the trial court entered an order banning communications with class members after defendants began a secret campaign to solicit exclusion requests to opt out of the class, in order to limit their potential liability in the class action. 751 F.2d 1197-98. The Eleventh Circuit held that the trial court properly used its authority under Rule 23(b)(3) and (d)(2) to ban communications because of the "inherent coercion conveyed by the Bank's covert campaign." Id. at 1206.

Both cases involved protecting the procedural rights of class members to participate in the litigation. Neither sanctioned a class communications order to vindicate the substantive rights of class members. In Gulf Oil, the Supreme Court was concerned with protecting the right of potential class members to join the litigation, and in Kleiner, the Eleventh Circuit was concerned with protecting the right of class members to remain in the litigation.

Each of the class communication orders entered here had elements of both proscription and prescription – banning communication absent inclusion of pre-approved language. As discussed above, the Court was quite clear that these orders were designed to protect the

substantive rights of class members. No "clear record and specific findings," as required by Gulf Oil, established that Interior was seeking to affect the rights of any class member to participate in the litigation. Indeed, because of the nature of the certified class – with no opportunity for an individual class member to opt out of this litigation – Interior does not possess the ability to affect the rights of any class member to participate in the litigation. The class communication orders are thus no longer viable under the July 11, 2006 decision of the Court of Appeals.

B. Future Communications

The current viability of the class communication orders after the Court of Appeals decision is not merely an academic question. The Court's prohibition on communications with class members affects Interior employees every day. Because the December 23, 2002 Order proscribes any communication "regarding this litigation or the claims involved therein," and Plaintiffs have broadly interpreted the involved claims, Interior employees continually risk being accused of violating the Order and being subjected to contempt motions.

A broad construction of the Court's Order – one not held by Defendants nor enforced by the Court – would arguably preclude Interior employees from communicating with class members concerning any matter related to IIM trust accounts – such as a request by a beneficiary for his or her current account balance – or a variety of other fiduciary activities, because these matters are all broadly related to this litigation, as defined by Plaintiffs. The "ordinary course of business" exception was supposed to give Interior employees a safe harbor, but because the boundary between communications that are in the ordinary course of business and those that are related to the litigation is indistinct, employees are in constant

jeopardy.[5] For example, until the Court's Order of September 29, 2004, Interior employees would have been justified in assuming that discussing land sales with class members was routine business unrelated to any claim in the litigation.

The notice regarding the existence of the litigation, and the rights of class members to consult with class counsel, that the Court prescribed after entry of the December 23, 2002 Order for inclusion in cover letters accompanying historical statements of account is not in itself objectionable. Indeed, if an appropriate Rule 23(d) predicate were established, the Court of Appeals has stated that Rule 23(d) can authorize notice informing the class members about the litigation and the right to consult with class counsel.

However, Plaintiffs never presented evidence to the Court that class members were unaware of the litigation or their right to contact counsel. The Court never held a hearing on this issue and no record with specific findings was ever compiled. Therefore, Plaintiffs have not established the need for a Rule 23(d) notice to class members.

That being said, because the language is unobjectionable – and may help a beneficiary – Interior intends to continue to include the notice in cover letters that accompany the transmittal of historical account statements. Nevertheless, Rule 23(d) does not authorize the order *requiring* this notice and the preapproval of all statements and accompanying materials before they can be sent.

Similarly, the notice and waiver process set up for land sales communications was not authorized by Rule 23(d). Because land sales are unrelated to any issue in the litigation, if the

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[5/] Although the D.C. Circuit did not mention the provision of the July 12, 2005 Order that vacated the ordinary course of business exception in the December 23, 2002 Order, this exception was presumably reinstated after the July 12, 2005 Order was vacated.

Court rescinds the September 29, 2004 Order, Interior would dispense with this unnecessary administrative burden on both Interior employees and Indian trust beneficiaries.

V. In the Alternative, Defendants Seek Limited Relief for Rulemaking Notice and Consultation

Interior is developing regulations related to trust management – including accounting-related administrative proceedings – to fulfill the Secretary's responsibilities to federally recognized tribes and individual Indians. See, e.g., Department of the Interior's 2007 Plan for Completing the Historical Accounting of IIM Accounts, at 20 (May 31, 2007) [Dkt. No. 3333]. Interior intends to provide public notice of its proposed rules and regulations and provide the opportunity for comment and consultation. In some situations, Interior may be *required* to consult and coordinate with Indian tribal governments – and, thus inevitably individual IIM account holders – because the process of amending these regulations constitutes "the development of Federal policies that have tribal implications." See Exec. Order No. 13,175, 65 Fed. Reg. 67,429 (Nov. 6, 2000).

Consultations and notice and comment regarding this rulemaking process will likely involve communications with class members. Consequently, if the Court denies Defendants' request to rescind the class communication orders, the Court nevertheless should amend these Orders to clarify that any communication with a class member – even a communication directly related to the subject matter of this litigation – as long as it is made pursuant to Defendants' rulemaking and notice or consultation authority would not violate the class communication orders.

In a colloquy between the Court and counsel at a status conference on October 19, 2004, the Court indicated that communications related to rulemaking are in the ordinary course of business – and thus not prohibited by the December 23, 2002 Order:

> MS. SPOONER: Your Honor, Interior periodically is involved in rule-makings that involve trust administration, and as a result of those rule-makings has conversations with class members about that rule-making. Is that something that would be covered by the Court's 2002 --
>
> THE COURT: That would be ordinary course of business. Rule-makings clearly are in the ordinary course of business.

Tr. at 52:16-23 (Oct. 19, 2004). Defendants request that the Court now clarify expressly that any communications between Interior and class members pursuant to rulemaking notice and comment or consultation are not prohibited.

Defendants further request that the Court clarify that counsel for Interior from the Office of the Solicitor and the Department of Justice will not violate D.C. Rule of Professional Conduct 4.2(a),[6] or any other rule of professional conduct, by providing advice and assistance to Interior regarding its proposed rulemaking and notice and consultation process. Any consultation with class members will be conducted by Interior officials acting in their official capacities, but it is expected that counsel may provide advice and assistance to Interior during the consultation process, including advice regarding the nature of any proposed rule.

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[6] Rule 4.2(a) provides:

> During the course of representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party known to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the lawyer representing such other party or is authorized by law to do so.

D.C. Rule of Prof. Conduct 4.2(a). This Court adopted the D.C. Rules of Professional Conduct as applicable to its proceedings. L.Civ. R. 83.15(a).

The District of Columbia Bar Legal Ethics Committee issued an opinion in 1997 that addresses this issue. In Opinion No. 274, the committee specifically endorsed the practice of attorneys from a Government agency participating in public meetings attended by claimants represented by counsel in an action against the agency. Dist. of Columbia Bar Legal Ethics Committee, Opinion No. 274, "Government Agency Attorneys May Participate in a Public Meeting at Which Claimants Who Are Represented By Counsel Are Present," Inquiry No. 94-8-33 (Sept. 17, 1997) (attached as Exhibit B).

This Court has twice before issued orders finding that public notice and consultation do not violate ethical rules concerning attorney contact with represented parties.[7] On March 28, 2000, the Court found that a proposed Federal Register process was acceptable and on December 12, 2001, the Court found that a proposed public consultation process would not violate any ethical rules. See Order of March 28, 2000 (Dkt. No. 479); Order of December 12, 2001 (Dkt. No. 1046).

CONCLUSION

For these reasons, Defendants respectfully ask that the Court grant the motion to rescind the class communication orders or, in the alternative, amend those orders to clarify that no order or ethical rule prohibits notice and consultation related to rulemaking authority.

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[7] However, in the December 23, 2002 memorandum opinion accompanying the class communication order, the Court found that attorney participation in what the Court deemed to be the "improper" transmission of the historical statements of account warranted referral to the Committee on Grievances of the U.S. District Court for the District of Columbia for an investigation of their conduct. 212 F.R.D. at 23-24. As discussed above, and in Defendants' motion for reconsideration of the December 23, 2002 Order, Defendants do not believe that the attorneys, or anyone else at Interior, acted improperly in this matter. After conducting its investigation, the Committee on Grievances concluded that "no further action is warranted in this matter" and discharged the complaint. Letter of February 27, 2004 (attached as Exhibit C).

Dated: June 22, 2007

Respectfully submitted,

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Assistant Attorney General
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J. CHRISTOPHER KOHN
Director

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CERTIFICATE OF SERVICE

I hereby certify that, on June 22, 2007 the foregoing *Defendants' Motion to Rescind or, in the Alternative, to Amend the Class Communication Orders* 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

United States Department of the Interior

OFFICE OF HISTORICAL TRUST ACCOUNTING

1801 Pennsylvania Avenue, NW, Suite 400
Washington, DC 20240
Phone (202) 327-5300
Fax (202) 327-5375

October 9, 2002

Parent(s) or Guardian of
John H. Doe
P. O. Box xxxx
Whiteriver, AZ xxxxx

Re: Individual Indian Money Account # 607JXXXXXX

Dear Parent(s) or Guardian:

This letter and the three enclosures are being sent to you because you are the parent(s) or guardian of the above-named account holder, who has at least one Individual Indian Money (IIM) account managed by the United States Department of the Interior (DOI). This letter and the three enclosures apply only to the IIM account which contains a share of settlement monies received by the account holder's tribe, the White Mountain Apache Tribe of Arizona. DOI's Office of Historical Trust Accounting (OHTA) recently performed an accounting of this account from the time it was opened through December 31, 2000. You will find a Historical Statement of Account enclosed with this letter. Please read the following information in this letter and the three enclosures carefully. They provide you with the following important information about the account.

- Accounting Results: Important information about the account, including limitations on the accounting and whether errors or losses were detected
- Accounting Approach: How the historical accounting was performed
- What You Should Do Next: Important deadlines for responding to and challenging the historical accounting
- Your Appeal Rights: How you can appeal to the Interior Board of Indian Appeals (IBIA)
- Questions: Who will answer questions and where you may obtain additional information

Accounting Results. The account was established for the account holder in 1997 to receive a share of a payment that was made to settle a claim filed as White Mountain Apache Tribe of Arizona v. United States, Court of Federal Claims Docket No. 22-H. As an enrolled member of the White Mountain Apache Tribe as of April 29, 1997, the account was credited with a payment of $[redacted] on November 3, 1997. As of December 31, 2000, the account balance totaled $[redacted], including interest of $[redacted].

The balance shown on the Historical Statement of Account as of December 31, 2000, agrees with the balance maintained by DOI's Office of Trust Funds Management (OTFM) as of the same date. The accompanying Historical Statement of Account details the receipts, interest, and other activity for the account holder's account from the opening deposit through December 31, 2000. **Please note that the account balance shown is for December 31, 2000.** For information about the account activity and balances after December 31, 2000, please refer to the Statement of Account sent to you quarterly by OTFM. In addition, the Historical Statement of Account does not reflect any funds or transactions for the other accounts which the account holder may have with OTFM.

DOI has identified several historical accounting issues that may affect the amount of interest paid to the account. Please read the enclosed *Statement of Accounting Limitations* to learn more about these important issues and how they might affect the account.

Accounting Approach. In performing the accounting, OHTA reviewed documents verifying the award, the approved tribal resolution distributing the award to tribal members, and the plan governing the use and distribution of the award. OHTA also verified the monthly interest based on the interest rate distribution factor determined by OTFM. An independent accounting firm reviewed the historical accounting work to ensure correctness. EXHIBIT A

What You Should Do Next. OHTA completed the enclosed Historical Statement of Account for the time from the opening of the account through December 31, 2000. You should compare the Historical Statement of Account to your files and records to determine if your records agree with the Historical Statement of Account and the balance it shows on December 31, 2000.

If you agree with the Historical Statement of Account and the balance shown, please retain this letter and the three enclosures with your records. No other action is required of you.

If you have concerns about the Historical Statement of Account included with this letter or if you believe it is in error, you may wish to file a challenge with OHTA. To challenge the enclosed Historical Statement of Account, you must provide a written explanation of your concerns and any documents, papers or information you want OHTA to consider within 60 calendar days of the postmark on the envelope containing this letter. You must mail this information to the following address.

Executive Director
Office of Historical Trust Accounting
U.S. Department of the Interior
1801 Pennsylvania Avenue, NW, Suite 400
Washington, DC 20006

If you need more than 60 calendar days to review or challenge the Historical Statement of Account, you may request a 30-calendar-day extension by contacting OHTA in writing at the address stated above before the 60-calendar-day time expires. **If you do not challenge the historical account statement or request an extension within 60 calendar days of the postmark on the envelope containing this letter, the enclosed Historical Statement of Account will be final and cannot be appealed.**

If you wish to challenge the Historical Statement of Account, OHTA will consider any explanation you provide and respond to you within 30 calendar days of the postmark on the envelope containing your challenge. OHTA's conclusions on your challenge will be provided in writing and will be clearly indicated as OHTA's final response.

Your Appeal Rights. You may appeal OHTA's final response to the Interior Board of Indian Appeals (IBIA) by filing a Notice of Appeal with IBIA within 30 calendar days of the date you receive OHTA's final response. OHTA will provide you with information about how to appeal to IBIA when it sends you its final written response.

Detailed rules and guidance for filing a Notice of Appeal with the IBIA can be found in Title 43 part 4 of the *Code of Federal Regulations* and in the Federal Register Notice published September 6, 2002 (67 Fed. Reg. 57121). These sources describe the items you must include in your Notice of Appeal.

The Historical Statement of Account provided with this letter will not be final or effective until after you have exhausted all administrative remedies and appeals (as above, to OHTA and IBIA) or until after the deadlines for doing so have otherwise expired.

Questions. Enclosed is a brochure answering general questions about the historical accounting project. If you have any questions about this letter or the enclosed Historical Statement of Account, please call OHTA toll-free at 1-888-329-5562. Also, additional background information, including a report OHTA provided to the United States Congress about its historical accounting project, is available on the Internet at **http://www.doi.gov/ohta.**

Very truly yours,

Bert T. Edwards

Bert T. Edwards, Executive Director
Enclosures (3) - Historical Statement of Account, Brochure, and Statement of Accounting Limitations

Statement of Accounting Limitations

In preparing the enclosed Historical Statement of Account, the Department of the Interior (DOI) identified several system-wide accounting issues that involve the amount of interest credited to trust fund accounts. These issues have not yet been fully resolved by DOI since DOI must complete additional research on the issues.

By statute and policy, funds in the Individual Indian Trust Fund have, typically, been invested in securities issued by the U.S. Treasury and U.S. Government sponsored entities. Maturities range from overnight investments with the U.S. Department of the Treasury to over ten years with a large concentration in the 5-10 year sector.

DOI's Office of Trust Funds Management (OTFM) determines the monthly interest factor to credit interest to each IIM account based on the total interest earnings for the month and the total average dollar balances of IIM accounts for the month. The interest factor used to determine the amount of interest credited to the account changes with the total amount of invested funds and the prevailing rates of interest. For the information, attached is a comparative summary of interest rates on investment pools similar to the IIM Trust Fund.

DOI has identified potential discrepancies that may affect invested funds accruing interest. Although DOI believes that these discrepancies are nominal, they may have a small impact on the amount of interest credited to the account. DOI has requested an appropriation from Congress to address certain issues. If this appropriation is received, DOI will make appropriate adjustments.

While the account holder's IIM account may be credited with additional interest in the future, the Historical Statement of Account is a crucial, important step in completing the overall historical accounting project for all Individual Indian Money accounts. As a result of the work performed on the accompanying Historical Statement of Account, DOI has confirmed several things.

- The initial deposit into the IIM account was correct.
- No improper disbursements were made from the account through December 31, 2000.
- The interest calculated by OTFM, based on the monthly interest distribution factor, was properly applied to the account.

As our work on the historical accounting project progresses, DOI will confirm the amount of additional interest the account may be entitled to, and explain to you how any such interest was determined.

It is not necessary for you to register a challenge to the accompanying Historical Statement of Account **(with respect to interest only)** since DOI is aware of this issue which may impact a large number of IIM accounts. If DOI determines that additional interest should be credited to the account in the future, this will be done whether or not you challenge the accuracy of the enclosed Historical Statement of Account.

COMPARATIVE INTEREST FACTORS

Month	IIM OTFM Factor[1]	10-Year Treasury Rates[2]	TSP "G" Fund[3]
November 1997	7.38	5.86	6.00
December 1997	6.47	5.74	6.24
January 1998	7.31	5.63	6.12
February 1998	6.21	5.63	5.28
March 1998	6.64	5.63	6.00
April 1998	6.90	5.67	5.88
May 1998	6.48	5.57	6.12
June 1998	6.95	5.46	5.76
July 1998	6.57	5.50	5.88
August 1998	6.43	5.20	5.88
September 1998	7.77	4.67	5.28
October 1998	6.60	4.63	4.92
November 1998	7.38	4.83	5.04
December 1998	6.87	4.75	5.16
January 1999	6.68	4.72	5.04
February 1999	5.71	5.00	4.56
March 1999	6.90	5.23	5.64
April 1999	6.16	5.26	5.52
May 1999	6.14	5.56	5.64
June 1999	6.39	5.98	5.88
July 1999	6.23	5.86	6.24
August 1999	6.69	5.81	6.36
September 1999	6.53	5.88	6.12
October 1999	6.85	6.16	6.36
November 1999	6.26	6.10	6.12
December 1999	6.57	6.41	6.18
January 2000	6.50	6.68	6.72
February 2000	6.25	6.38	6.36
March 2000	6.61	6.13	6.60
April 2000	6.96	6.15	6.24
May 2000	6.39	6.42	6.48
June 2000	6.62	6.08	6.36
July 2000	6.31	6.04	6.36
August 2000	6.31	5.75	6.24
September 2000	6.85	5.82	5.88
October 2000	6.14	5.66	6.12
November 2000	6.27	5.65	5.76
December 2000	6.5	5.1	5.76

[1] OTFM; Albuquerque, NM

[2] McCary Stevens Associates Inc. (Rates at which new issues of 10-year United States Government (USG) bonds were issued)

[3] Thrift Savings Plan website www.tsp.gov/rates/history/html. The TSP "G" Fund is similar to an IRS section 401(k) Plan. The TSP "G" Fund invests solely in USG debt securities and debt securities guaranteed by the USG.

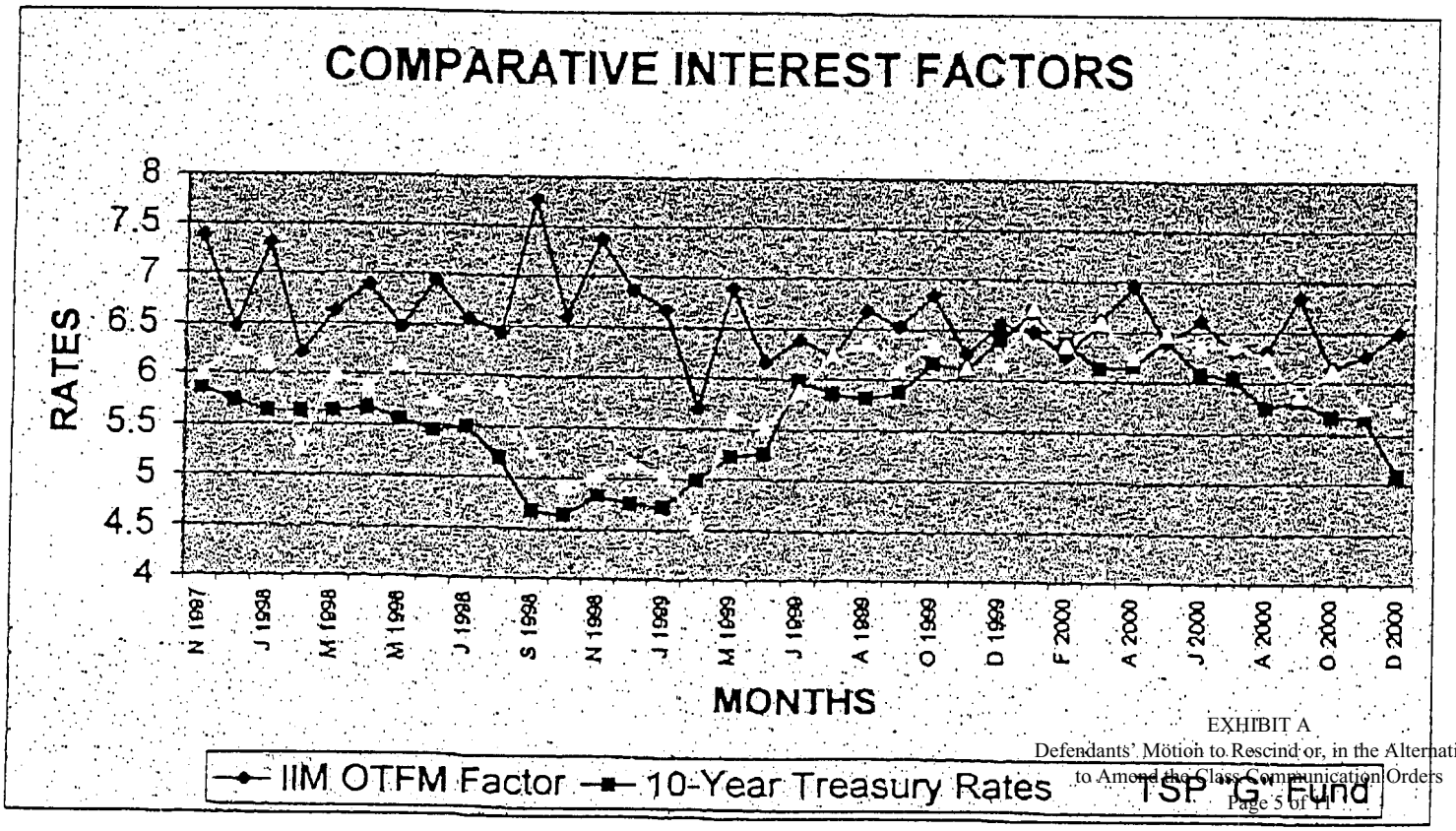
There are a number of mutual funds where objective is to invest principally in USG securities or securities guaranteed by the USG. Unlike the IIM Trust Fund investments, a portion of the investments of the following mutual fund is invested in derivatives such as repurchase agreements. Generally derivatives represent higher risk factor, and thus a higher return, than USG securities. Monthly rates of return for the following mutual funds are not readily available, however, annual rates of return are set forth below.

Fund	1998	1999	2000
T. Rowe Price – U. S. Treasury – Intermediate Fund (3 – 10 year terms)	9.58%	4.28%	1.97%

1997 – 2001 Average Rates of Return – Intermediate Term (3 – 10 year terms) – USG Bonds

Vanguard (VFITX) – 8.2%
Galaxy II (IUTIX) – 7.8%
American Century (CPTNX) – 7.6%
Fidelity Spartan (SPGVX) – 7.6%

Source: www.aaii.com/promo/2002.0513/mfunds2.shtml



How to Read Your Historical Statement of Account

our Historical Statement of Account describes e transactions associated with either a judgment count or a per capita Individual Indian Money IM) account. If your IIM account is a judgment count, money was awarded to the Tribe as the sult of a lawsuit and then distributed to each rolled member of the Tribe. Per capita funds so represent Tribal payments to individuals, but e money comes from a source other than a dgment award, such as Tribal timber sales. The tails of your account are included in the storical Statement of Account.

Account Statement

our account opens with a beginning balance of ro. The first transaction identifies the judgment per capita payment made into your account. ch entry after that represents a transaction curring in the account. A date and description each transaction is included in your statement. our statement ends with the account balance as December 31, 2000. THIS IS NOT THE JRRENT BALANCE. Unless otherwise stated the cover letter, our review of your account ncludes that the judgment or per capita yment, account transactions, and the December , 2000, balance are correct.

What Should I Do With This Historical Statement of Account?

Carefully review the Historical Statement of count and compare it to your records. If you agree with the results shown on the count statement, please retain it with your other cords.

If you wish to challenge the results shown on the account statement:

1. Provide a written explanation and any supporting documents within 60 calendar days of the postmark on the envelope to:

Executive Director
Office of Historical Trust Accounting
U.S. Department of the Interior
1801 Pennsylvania Ave., N.W., Suite 400
Washington, D.C. 20006

2. If you need more than 60 days to review or challenge the Historical Statement of Account, you may request a 30-day extension by contacting Office of Historical Trust Accounting (OHTA) in writing at the address shown above.

3. If you do not challenge the account statement or request an extension within 60 calendar days of the postmark on the envelope containing this letter and statement, the account statement will be final and cannot be appealed.

4. OHTA will consider any explanation you provide and respond to you within 30 calendar days from the postmark on your challenge. OHTA's conclusions on your challenge will be provided in writing and will be indicated as OHTA's final response.

- If after receiving a written notice from OHTA indicating it is a final response, you wish to appeal the account statement, you must file a Notice of Appeal with the Interior Board of Indian Appeals (IBIA) within 30 calendar days of receipt of OHTA's final response which will clearly be identified "Final Response." Together with its final response, OHTA will furnish you with information about how to file an appeal with IBIA.

Information on the rules and guidance for filing a Notice of Appeal with IBIA can be found in Title 43 part 4 of the *Code of Federal Regulations* and in the *Federal Register* notice published September 6, 2002.

Questions and Answers

Why are you receiving this account statement?

The American Indian Trust Fund Management Reform Act of 1994 provides that IIM account holders be given an accounting of the funds held in trust. Your Historical Statement of Account has been prepared to assist you in understanding the transactions affecting the funds in your account.

Why does the historical accounting end on December 31, 2000?

December 31, 2000, was selected because all Bureau of Indian Affairs (BIA) Regions and Agencies had converted to the Trust Funds Accounting System (TFAS) by this date. Quarterly statements have been mailed for IIM accounts since early 2000, except for estate accounts and account holders whose current address is unknown.

Will you receive a check for the balance shown?

No, this accounting is similar to a bank statement. The purpose of the accounting was to review your account and make sure it was correct as of December 31, 2000.

Questions and Answers (continued)

re you owed money?

'he amount shown on your Historical tatement of Account represents the balance f your IIM account on December 31, 2000. or information regarding account activity nd balances after December 31, 2000, please efer to the quarterly Statement of Account ent to you by the Department of the Interior ffice of Trust Funds Management (OTFM). he amount shown on your most recent tatement of Account is the balance held in ust for you as of the date of the Statement, id will be paid subject to applicable terms of our account.

'hat time period is covered by the historical ccounting?

our Historical Statement of Account begins ith the date the account was opened and oncludes on December 31, 2000. The ccount balance shown for December 31, 000, is NOT THE CURRENT BALANCE.

ow can you find out your IIM account ctivity after December 31, 2000?

TFM periodically provides a Statement of ccount for IIM accounts. The most recent atement of Account provided by OTFM ill include the balance for your IIM account of the date of that Statement. If you wish obtain the current balance, you should ontact your local BIA Agency Office or TFM toll free at 1-888-OST-OTFM (888-78-6836).

Does your Historical Statement of Account cover any other IIM accounts you may have?

No, your Historical Statement of Account only addresses the transactions occurring for the judgment or per capita account number identified on the Historical Statement of Account.

How can you report a change of address?

Historical statements of account for judgment accounts are being sent to the parents or guardians or IIM account holders. To report a change in address, please call or write your local BIA Agency office. In an attempt to locate IIM account holders whose account statements are returned to OHTA by the U.S. Postal Service as not deliverable, the names of those whose Historical Statement of Account is returned will be posted on the OHTA website, **www.doi.gov/ohta**. These names will also be available for review at your Tribal Headquarters, BIA Agency offices, and OTFM locations.

Where Can I get More Information?

You can request more information by mail, telephone, or internet.

Mail:
U.S. Department of the Interior
Office of Historical Trust Accounting
1801 Pennsylvania Avenue, N.W., Suite 400
Washington, DC 20006

Telephone:
1-888-329-5562

Electronic Mail: OHTA@ios.doi.gov

U.S. DEPARTMENT OF THE INTERIOR

Information On Historical Accounting of Judgment and Per Capita IIM Accounts

OFFICE OF HISTORICAL TRUST ACCOUNTING
INDIVIDUAL INDIAN MONIES TRUST FUNDS
HISTORICAL STATEMENT OF ACCOUNT

TO THE PARENT(S) OR GUARDIAN OF
[redacted]
PO BOX [redacted]
WHITERIVER AZ 85941

ACCOUNT OF [redacted]
ACCOUNT NUMBER [redacted]

As explained in the attached Historical Statement of Account transmittal letter, the account balance at December 31, 2000 was $[redacted].

This balance was composed of the following:

Judgment award from Docket 22-H	$[redacted]
Cumulative interest	[redacted]
Ending balance as of December 31, 2000	$[redacted]

The account activity is detailed below. Interest was calculated based on average daily balance using the interest factor determined for each period by Interior's Office of Trust Funds Management. This factor, which may vary by period, is based upon the IIM Trust Funds' investments. Please note, the account balance shown is for December 31, 2000 (the date through which the historical accounting was performed). For account activity and balances after December 31, 2000, please refer to the quarterly Statements of Account.

TRANSACTION ACTIVITY FOR ACCOUNTING PERIOD: 11/3/1997 THROUGH 12/31/2000

DATE	AMOUNT	TRANSACTION DESCRIPTION	DOCUMENT REFERENCE (If calling, this information may be needed.)
	[redacted]	BEGINNING BALANCE	
11/3/1997	[redacted]	Receipt of judgment award - Docket 22-H	Collection JUDGMENT PER CAPITA [redacted]
12/18/1997	[redacted]	Monthly Interest	Journal Voucher MONTHLY - AUTO [redacted]
1/15/1998	[redacted]	Monthly Interest	Journal Voucher MONTHLY - AUTO [redacted]
2/19/1998	[redacted]	Monthly Interest	Journal Voucher MONTHLY - AUTO [redacted]

EXHIBIT A
Defendants' Motion to Rescind or, in the Alternative, to Amend the Class Communication Orders
Page 8 of 11

DATE	AMOUNT	TRANSACTION DESCRIPTION	DOCUMENT REFERENCE (If calling, this information may be needed.)
3/30/1998	[redacted]	Monthly Interest	Journal Voucher MONTHLY - AUTO [redacted]
4/27/1998	[redacted]	Monthly Interest	Journal Voucher MONTHLY - AUTO [redacted]
5/28/1998	[redacted]	Monthly Interest	Journal Voucher MONTHLY - AUTO [redacted]
6/26/1998	[redacted]	Monthly Interest	Journal Voucher MONTHLY - AUTO [redacted]
7/30/1998	[redacted]	Monthly Interest	Journal Voucher MONTHLY - AUTO [redacted]
8/21/1998	[redacted]	Monthly Interest	Journal Voucher MONTHLY - AUTO [redacted]
9/28/1998	[redacted]	Monthly Interest	Cash Receipt MONTHLY INTEREST EARNINGS DOCUMENT # [redacted]
10/30/1998	[redacted]	Monthly Interest	Cash Receipt MONTHLY INTEREST EARNINGS DOCUMENT # [redacted]
11/19/1998	[redacted]	Monthly Interest	Cash Receipt MONTHLY INTEREST EARNINGS DOCUMENT # [redacted]
12/18/1998	[redacted]	Monthly Interest	Cash Receipt MONTHLY INTEREST EARNINGS DOCUMENT # [redacted]
1/14/1999	[redacted]	Monthly Interest	Cash Receipt MONTHLY INTEREST EARNINGS DOCUMENT # [redacted]
2/18/1999	[redacted]	Monthly Interest	Cash Receipt MONTHLY INTEREST EARNINGS DOCUMENT # [redacted]
3/18/1999	[redacted]	Monthly Interest	Cash Receipt MONTHLY INTEREST EARNINGS DOCUMENT # [redacted]
4/19/1999	[redacted]	Monthly Interest	Cash Receipt MONTHLY INTEREST EARNINGS DOCUMENT # [redacted]

DATE	AMOUNT	TRANSACTION DESCRIPTION	DOCUMENT REFERENCE (If calling, this information may be needed.)
5/18/1999	[redacted]	Monthly Interest	Cash Receipt MONTHLY INTEREST EARNINGS [redacted]OCUMENT [redacted]
6/16/1999	[redacted]	Monthly Interest	Cash Receipt MONTHLY INTEREST EARNINGS DOCUMENT #[redacted]
7/14/1999	[redacted]	Monthly Interest	Cash Receipt MONTHLY INTEREST EARNINGS DOCUMENT #[redacted]
8/19/1999	[redacted]	Monthly Interest	Cash Receipt MONTHLY INTEREST EARNINGS DOCUMENT #[redacted]
9/16/1999	[redacted]	Monthly Interest	Cash Receipt MONTHLY INTEREST EARNINGS DOCUMENT #[redacted]
10/21/1999	[redacted]	Monthly Interest	Cash Receipt MONTHLY INTEREST EARNINGS DOCUMENT #[redacted]
11/18/1999	[redacted]	Monthly Interest	Cash Receipt MONTHLY INTEREST EARNINGS DOCUMENT #[redacted]
12/17/1999	[redacted]	Monthly Interest	Cash Receipt MONTHLY INTEREST EARNINGS DOCUMENT #[redacted]
1/24/2000	[redacted]	Monthly Interest	Cash Receipt MONTHLY INTEREST EARNINGS DOCUMENT #[redacted]
2/23/2000	[redacted]	Monthly Interest	Cash Receipt MONTHLY INTEREST EARNINGS DOCUMENT #[redacted]
3/17/2000	[redacted]	Monthly Interest	Cash Receipt MONTHLY INTEREST EARNINGS DOCUMENT #[redacted]
4/21/2000	[redacted]	Monthly Interest	Cash Receipt MONTHLY INTEREST EARNINGS DOCUMENT #[redacted]
5/18/2000	[redacted]	Monthly Interest	Cash Receipt MONTHLY INTEREST EARNINGS DOCUMENT #[redacted]
6/15/2000	[redacted]	Monthly Interest	Cash Receipt MONTHLY INTEREST EARNINGS DOCUMENT #[redacted]

DATE	AMOUNT	TRANSACTION DESCRIPTION	DOCUMENT REFERENCE (If calling, this information may be needed.)
7/20/2000	[redacted]	Monthly Interest	Cash Receipt MONTHLY INTEREST EARNINGS DOCUMENT #[redacted]
8/17/2000	[redacted]	Monthly Interest	Cash Receipt MONTHLY INTEREST EARNINGS DOCUMENT #[redacted]
9/6/2000	[redacted]	Monthly Interest	Cash Receipt MONTHLY INTEREST EARNINGS DOCUMENT #[redacted]
10/4/2000	[redacted]	Monthly Interest	Cash Receipt MONTHLY INTEREST EARNINGS DOCUMENT #[redacted]
11/3/2000	[redacted]	Monthly Interest	Cash Receipt MONTHLY INTEREST EARNINGS DOCUMENT #[redacted]
12/5/2000	[redacted]	Monthly Interest	Cash Receipt MONTHLY INTEREST EARNINGS DOCUMENT #[redacted]
12/31/2000	[redacted]	**BALANCE AT DECEMBER 31, 2000**	

Please note the ending balance is NOT THE CURRENT BALANCE of your IIM account. The account balance shown is for December 31, 2000 (the date through which the historical accounting was performed). If you have questions about this Historical Statement of Account, please call the Office of Historical Trust Accounting toll free (888) 329-5562. For account activity and balances after December 31, 2000, please refer to the quarterly Statements of Account. If you have questions about your quarterly Statements of Account or your current IIM account balance, please call the Office of Trust Funds Management toll free (888) 678-6836.

For Lawyers
For the Public
Inside the Bar

Opinion 274

Government Agency Attorneys May Participate in a Public Meeting at Which Claimants Who Are Represented by Counsel Are Present

A government agency has a practice of conducting public meetings for people who have claims under the agency's program. The purpose of these meetings is to explain the program, explain agency policies, and respond to questions.

A lawyer who represents a group of claimants cannot prevent the agency from conducting the meeting on the ground that the meeting constitutes an unauthorized contact by the agency's counsel with represented parties under Rule 4.2(a). This is true regardless of the fact that the agency's lawyers may attend, and even participate in, the meeting.

Applicable Rule

- Rule 4.2(a) (Communication Between Lawyer and Opposing Parties)

Inquiry

The Pension Benefit Guaranty Corporation ("PBGC") is a corporation owned by the United States Government and established pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1302. PBGC administers, among other things, a pension plan termination insurance program. When an under-funded pension plan terminates, PBGC is generally appointed as a statutory trustee of the plan. As trustee, PBGC has powers analogous to those of a trustee under Section 704 of the Bankruptcy Code, 11 U.S.C. §7 04, and PBGC is responsible for paying benefits under the plan in accordance with requirements of Title IV of ERISA. 29 U.S.C. § 1342(d)(3).

In the circumstances giving rise to this inquiry, PBGC was appointed to be trustee of a Colorado-based plan having approximately 4300 participants at the time of its termination. Pursuant to the agency's established practice, PBGC sent a notice to the known plan participants inviting them to attend a meeting convened by PBGC.

The purpose of the meeting was to provide general information about the PBGC insurance system, to describe the general limitations of the ERISA guarantee, and to answer questions. At meetings of this type, PBGC employees discuss the procedures for filing claims, the nature and extent of these types of benefits that are guaranteed by PBGC, and the agency's policies and procedures for handling claims. The meetings are thought to be an efficient method of disseminating information to claimants and of answering recurrent questions that claimants tend to raise with the agency.

Before the time of the meeting, 300 of the plan beneficiaries retained counsel to assist them in obtaining payment of certain specific claims. PBGC had responsibility for determining in the first instance whether the beneficiary's claims would be paid.

The attorney representing 300 of the beneficiary/claimants wrote to PBGC and demanded that the agency not hold the meeting. Counsel asserted that the proposed meeting was an attempt to side-step or undermine her representation of her 300 claimant clients in violation of Rule 4.2(a). Counsel demanded that PBGC deal directly and exclusively with her with regard to the claims of her clients.

PBGC meetings of this type are conducted by a non-lawyer employee of PBGC. However, a PBGC staff attorney attends the meeting for the purpose of providing advice to the non-lawyer concerning the conduct of the meeting. The staff attorney typically does not address the meeting, although it is possible that if a question beyond the legal competence of the non-lawyer PBGC employee who is conducting the meeting were asked, the PBGC staff attorney might give part or all of the

response to the question.

The Inquirer, a staff attorney for PBGC, has requested the Committee's opinion on the application of Rule 4.2(a) to the circumstances described above. Specifically, the Inquirer asks whether: (1) PBGC was obliged to cancel the meeting in response to counsel's demand; (2) PBGC was required to direct its attorneys not to attend the meeting; and (3)PBGC should invite or direct counsel's 300 beneficiary/claimant clients to leave the meeting.

The Inquirer has also requested the Committee's opinion on the application of Rule 4.2(a) to PBGC's practice of using contractors to perform administerial functions for PBGC. These contractors operate as "field benefit administrators" in locations where PBGC does not have employee representatives. The contractors work under the supervision of non-lawyer employees of PBGC and provide most of the front-line services to plan participants. For example, such services may include collecting of plan records, applications, and personal data from claimants and explaining plan provisions and PBGC guarantee limitations. In this capacity, the contractors receive numerous telephone inquiries and office visits from participants who may, or may not, be represented by counsel.

Discussion

Rule 4.2(a) provides that:

> During the course of representing a client, a lawyer shall not communicate, or cause another to communicate, about the subject of the representation with a party known to be represented by a another lawyer in the matter, unless the lawyer has the prior consent of the lawyer representing such party or is authorized by law to do so.

It is first worth noting the purpose of the rule at issue here. Rule 4.2(a) is designed to prevent a lawyer from communicating directly with opposing counsel's client. Among its main purposes is the protection of the adversary system. A client who receives a communication from opposing counsel without the participation of his own counsel may not be able to evaluate the correctness of statements of law made by opposing counsel. Without the participation of his lawyer, an unprotected client may be induced by opposing counsel into making admissions, waiving confidentiality, or taking positions detrimental to the client's interest without the client's realizing it because the client's lawyer is not aware of, and not participating in, the communication. *See* D.C. Bar Op. 258 (1995), particularly text at nn. 5-10. Rule 4.2(a) is, by its very terms, waivable by counsel (and only by counsel) in the sense that, in appropriate circumstances, a lawyer can authorize opposing counsel to contact his client without the lawyer's participation.

There are a number of reasons why the Committee believes that Rule 4.2(a) does not prevent PBGC's conduct at issue in this inquiry. In the first place, the meetings that are described by Inquirer are initiated by PBGC itself as part of its functions as trustee, and the attendance of the PBGC's staff attorney is incidental. There is no indication that PBGC's staff attorneys are using non-lawyer employees of the agency to accomplish indirectly anything that the staff attorneys would themselves be prevented by Rule 4.2(a) from accomplishing directly.

The rule does not by definition apply to non-lawyers and therefore by extension does not apply to the clients of lawyers unless there is some indication - not present here -that lawyers are using non-lawyers to circumvent the rules. To the extent that PBGC is the client of its in-house lawyers in this situation, the ethics rules for lawyers would not prevent the non-lawyer employees of the agency from conducting meetings of this type.

The inquiry, seen in this light, resolves into a question of whether the non-lawyer employees of PBGC who conduct these meetings can be accompanied to the meetings by the agency's counsel when some (but probably not all) members of the audience may be represented by counsel. We discern no valid reason why PBGC's non-lawyer employees should be deprived of the advice of the agency's counsel in these circumstances.

Finally, when the lawyer representing the claimants is aware in advance of the meeting—which she undoubtedly was in this case—the lawyer representing the claimants has a number of choices: she can consent to her clients' attendance at the meeting; she can attend the meeting with her clients; or she can counsel her clients not to attend. The lawyer for the claimants, however, seeks to convert a prophylactic rule, which

prevents unconsented contact with her clients by opposing counsel, into an offensive weapon by which the lawyer can prevent PBGC from conducting its public meeting.

PBGC does not discuss the facts and circumstances of individual claimants at such meetings. Rather, as we understand it, the purpose of these meetings is to give general information concerning the outlines of the agency's program and the types of benefits that the agency guarantees and to answer general questions along these lines. The rules of ethics for lawyers should not interfere with the right of non-lawyer employees and staff attorneys for a government agency from communicating this kind of useful information to the interested public absent a very clear reason to do so.

It may be possible to imagine circumstances in which a question from the floor was so specifically idiosyncratic to the questioner in a particular case where the agency staff attorney knows that the questioner is represented by counsel, that prudence would dictate deferring a response to such a question to the ordinary course of the claims adjudication process.

However, so long as the focus of the meeting remains on the provision of general information to the interested public, nothing in Rule 4.2(a) impinges on the conduct of non-lawyer employees of the agency, and lawyer employees of the agency can participate in the process unless they know that they are being drawn into a discussion of an individualized subject as to which a potential claimant is represented by counsel.

As to the second branch of the inquiry concerning the field benefit administrators, these contractors are, by definition, not lawyers, and therefore nothing in Rule 4.2(a) impinges on their conduct. Only in a circumstance where an agency attorney sought to communicate with a represented client through the intermediary of a field benefit administrator with the purpose of circumventing the claimant's attorney would Rule 4.2(a) come into effect. However, on the facts of the inquiry presented to us, there is no indication that such conduct is present here.

Inquiry No. 94-8-33
Adopted: September 17, 1997

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

COMMITTEE ON GRIEVANCES

E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W., Room 4106
Washington, D.C. 20001

Laurel Pyke Malson, Chair
(202) 624-2576
(202) 628-5116 fax

February 27, 2004

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Cynthia L. Alexander, Esquire
Commercial Litigation Branch
Civil Division
United States Department of Justice
P.O. Box 875
Ben Franklin Station
Washington, D.C. 20044-0875

Re: *Cobell v. Norton* Referral

Dear Ms. Alexander:

Pursuant to Rule 83.16(d)(3) of the Rules of the United States District Court for the District of Columbia, the Committee on Grievances hereby notifies you that it has completed its investigation of the matter referred by Judge Lamberth in the above-referenced case and has determined that no further action is warranted in this matter. Accordingly, the Complaint is discharged and the matter is now closed.

The Committee also wishes to thank you for your cooperation in this matter.

Very truly yours,

Laurel Pyke Malson, Chair
Committee on Grievances

cc: Honorable Paul L. Friedman, Liaison Judge
Sheldon Snook, Clerk

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

COMMITTEE ON GRIEVANCES

E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W., Room 4106
Washington, D.C. 20001

Laurel Pyke Malson, Chair
(202) 624-2576
(202) 628-5116 fax

February 27, 2004

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

J. Christopher Kohn, Esquire
Director
U.S. Department of Justice
Commercial Litigation Branch
Ben Franklin Station
P.O. Box 875
Washington, D.C. 20044-0875

Re: *Cobell v. Norton* Referral

Dear Mr. Kohn:

Pursuant to Rule 83.16(d)(3) of the Rules of the United States District Court for the District of Columbia, the Committee on Grievances hereby notifies you that it has completed its investigation of the matter referred by Judge Lamberth in the above-referenced case and has determined that no further action is warranted in this matter. Accordingly, the Complaint is discharged and the matter is now closed.

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Very truly yours,

Laurel Pyke Malson, Chair
Committee on Grievances

cc: Honorable Paul L. Friedman, Liaison Judge
Sheldon Snook, Clerk

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

COMMITTEE ON GRIEVANCES

E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W., Room 4106
Washington, D.C. 20001

Laurel Pyke Malson, Chair
(202) 624-2576
(202) 628-5116 fax

February 27, 2004

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Peter Miller, Esquire
Commercial Litigation Branch
Civil Division
United States Department of Justice
P.O. Box 875
Ben Franklin Station
Washington, D.C. 20044-0875

Re: *Cobell v. Norton* Referral

Dear Mr. Miller:

Pursuant to Rule 83.16(d)(3) of the Rules of the United States District Court for the District of Columbia, the Committee on Grievances hereby notifies you that it has completed its investigation of the matter referred by Judge Lamberth in the above-referenced case and has determined that no further action is warranted in this matter. Accordingly, the Complaint is discharged and the matter is now closed.

The Committee also wishes to thank you for your cooperation in this matter.

Very truly yours,

Laurel Pyke Malson, Chair
Committee on Grievances

cc: Honorable Paul L. Friedman, Liaison Judge
Sheldon Snook, Clerk

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

COMMITTEE ON GRIEVANCES

E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W., Room 4106
Washington, D.C. 20001

Laurel Pyke Malson, Chair
(202) 624-2576
(202) 628-5116 fax

February 27, 2004

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Stuart E. Schiffer, Esquire
Deputy Assistant Attorney General
Civil Division
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Rm. 3609
Washington, D.C. 20530

Re: *Cobell v. Norton* Referral

Dear Mr. Schiffer:

Pursuant to Rule 83.16(d)(3) of the Rules of the United States District Court for the District of Columbia, the Committee on Grievances hereby notifies you that it has completed its investigation of the matter referred by Judge Lamberth in the above-referenced case and has determined that no further action is warranted in this matter. Accordingly, the Complaint is discharged and the matter is now closed.

The Committee also wishes to thank you for your cooperation in this matter.

Very truly yours,

Laurel Pyke Malson, Chair
Committee on Grievances

cc: Honorable Paul L. Friedman, Liaison Judge
Sheldon Snook, Clerk

Spooner

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

COMMITTEE ON GRIEVANCES

E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W., Room 4106
Washington, D.C. 20001

Laurel Pyke Malson, Chair
(202) 624-2576
(202) 628-5116 fax

February 27, 2004

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Sandra P. Spooner, Esquire
Deputy Director
Commercial Litigation Branch
Civil Division
United States Department of Justice
P.O. Box 875, Ben Franklin Station
Washington, D.C. 20044-0875

Re: *Cobell v. Norton* Referral

Dear Ms. Spooner:

Pursuant to Rule 83.16(d)(3) of the Rules of the United States District Court for the District of Columbia, the Committee on Grievances hereby notifies you that it has completed its investigation of the matter referred by Judge Lamberth in the above-referenced case and has determined that no further action is warranted in this matter. Accordingly, the Complaint is discharged and the matter is now closed.

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Very truly yours,

Laurel Pyke Malson, Chair
Committee on Grievances

cc: Honorable Paul L. Friedman, Liaison Judge
Sheldon Snook, Clerk

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

COMMITTEE ON GRIEVANCES

E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W., Room 4106
Washington, D.C. 20001

Laurel Pyke Malson, Chair
(202) 624-2576
(202) 628-5116 fax

February 27, 2004

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

John T. Stemplewicz, Esquire
Senior Trial Attorney
U.S. Department of Justice
Commercial Litigation Branch
Ben Franklin Station
P.O. Box 875
Washington, D.C. 20044-0875

Re: *Cobell v. Norton* Referral

Dear Mr. Stemplewicz:

Pursuant to Rule 83.16(d)(3) of the Rules of the United States District Court for the District of Columbia, the Committee on Grievances hereby notifies you that it has completed its investigation of the matter referred by Judge Lamberth in the above-referenced case and has determined that no further action is warranted in this matter. Accordingly, the Complaint is discharged and the matter is now closed.

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Very truly yours,

Laurel Pyke Malson, Chair
Committee on Grievances

cc: Honorable Paul L. Friedman, Liaison Judge
Sheldon Snook, Clerk

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

COMMITTEE ON GRIEVANCES

E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W., Room 4106
Washington, D.C. 20001

Laurel Pyke Malson, Chair
(202) 624-2578
(202) 628-5116 fax

February 27, 2004

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Larry Jensen, Esquire
Office of the Solicitor
Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

Re: *Cobell v. Norton* Referral

Dear Mr. Jensen:

Pursuant to Rule 83.16(d)(3) of the Rules of the United States District Court for the District of Columbia, the Committee on Grievances hereby notifies you that it has completed its investigation of the matter referred by Judge Lamberth in the above-referenced case and has determined that no further action is warranted in this matter. Accordingly, the Complaint is discharged and the matter is now closed.

The Committee also wishes to thank you for your cooperation in this matter.

Very truly yours,

Laurel Pyke Malson, Chair
Committee on Grievances

cc: Honorable Paul L. Friedman, Liaison Judge
Sheldon Snook, Clerk

Rec'd 3/2/04

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

COMMITTEE ON GRIEVANCES

E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W., Room 4106
Washington, D.C. 20001

Laurel Pyke Malson, Chair
(202) 624-2576
(202) 628-5116 fax

February 27, 2004

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Ross O. Swimmer, Esquire
Special Trustee for American Indians
Department of the Interior
1849 C Street, N.W.
Room 5140
Washington, D.C. 20240

Re: *Cobell v. Norton* Referral

Dear Mr. Swimmer:

Pursuant to Rule 83.16(d)(3) of the Rules of the United States District Court for the District of Columbia, the Committee on Grievances hereby notifies you that it has completed its investigation of the matter referred by Judge Lamberth in the above-referenced case and has determined that no further action is warranted in this matter. Accordingly, the Complaint is discharged and the matter is now closed.

The Committee also wishes to thank you for your cooperation in this matter.

Very truly yours,

Laurel Pyke Malson, Chair
Committee on Grievances

cc: Honorable Paul L. Friedman, Liaison Judge
Sheldon Snook, Clerk

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

COMMITTEE ON GRIEVANCES

E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W., Room 4106
Washington, D.C. 20001

Laurel Pyke Malson, Chair
(202) 624-2576
(202) 628-5116 fax

February 27, 2004

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

William G. Myers, III, Esquire
Holland, Hart & Boise
Suite 1400
101 South Capitol Blvd.
Boise, Idaho 83702

Re: *Cobell v. Norton* Referral

Dear Mr. Myers:

Pursuant to Rule 83.16(d)(3) of the Rules of the United States District Court for the District of Columbia, the Committee on Grievances hereby notifies you that it has completed its investigation of the matter referred by Judge Lamberth in the above-referenced case and has determined that no further action is warranted in this matter. Accordingly, the Complaint is discharged and the matter is now closed.

The Committee also wishes to thank you for your cooperation in this matter.

Very truly yours,

Laurel Pyke Malson, Chair
Committee on Grievances

cc: Honorable Paul L. Friedman, Liaison Judge
Sheldon Snook, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
Plaintiffs,	)	
v.	)	Case No. 1:96cv01285 (JR)
DIRK KEMPTHORNE, Secretary of the Interior, et al.,	)	
Defendants.	)	

ORDER

This matter comes before the Court on *Defendants' Motion to Rescind, or, in the Alternative, to Amend, the Class Communication Orders* (Dkt. No.). Upon consideration of the Defendants' Motion, any Opposition by Plaintiffs, Reply thereto, and the entire record of this case, it is hereby

ORDERED that the *Court's Memorandum and Order of December 23, 2002* (Dkt. No. 1692), prohibiting the parties, their agents, and their counsel from communicating with any class member regarding the litigation or the claims involved therein; the *Court's Memorandum Opinion and Order of September 29, 2004* (Dkt. No.s 2707-2708), supplementing the above December 23, 2002 Order; the *Court's Order of October 1, 2004* (Dkt. No. 2713), clarifying the above September 29, 2004 Order; the *Court's Order of October 22, 2004* (Dkt. No. 2743) (*Cobell v Norton*, 224 F.R.D. 266 (D.D.C. 2004)), which further clarified the above September 29, 2004 and the *Court's November 17, 2004 Memorandum Order* (Dkt. No.2763)(*Cobell v. Norton*, 225 F.R.D. 4 (D.D.C. 2004)), regarding the land sale notice and waiver procedure are no longer appropriate or justified, as a matter of law and are hereby, VACATED as of this date;

IT IS FURTHER ORDERED that any communications with class members related to the Defendants' rule-making authority are communications in the ordinary course of business and do not violate the D. C. Rules of Professional Conduct.

SO ORDERED.

_____

Hon. James Robertson
UNITED STATES DISTRICT JUDGE
United States District Court for the
District of Columbia

Date:_____