IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

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

Plaintiffs' Opposition to Defendants' Motion to Rescind or, in the Alternative, to Amend the Class Communication Orders ("Opposition") reveals that Plaintiffs and Defendants disagree about the circumstances surrounding the issuance of the class communication orders, but agree that Federal Rule of Civil Procedure 23(d) only authorizes a class communication order if it protects the class members' procedural rights to participate in the litigation. See, e.g., Opposition at 16, 17, 21, 24. This is the legal standard that the Court of Appeals enunciated in Cobell v. Kempthorne, 455 F.3d 317, 324-25 (D.C. Cir. 2006) ("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.").

As discussed in Defendants' Motion to Rescind or, in the Alternative, to Amend the Class Communication Orders ("Motion"), this is not the legal standard that Plaintiffs articulated, and that the Court applied, when the December 23, 2002 and September 29, 2004 class communication orders were argued, and entered. Instead, the Court used the same legal standard for these orders that it used for the July 12, 2005 class communication order, which

the Court of Appeals vacated because it did not comply with Rule 23(d). Because those earlier class communication orders also lacked Rule 23(d) authority, they likewise should be rescinded.

I. No Action by Defendants Could Extinguish a Class Member's Rights in this Case

Although Plaintiffs attempt in their Opposition – in error, as discussed below – to describe the events preceding the December 23, 2002 and September 29, 2004 class communication orders, they nowhere explain how any communication by Defendants could – or did – extinguish any class member's right to participate in this class action, which was certified under Fed. R. Civ. P. 23(b)(1) and (b)(2) – provisions applicable solely to claims for declaratory or general injunctive relief. As explained in Defendants' Motion, because this is an Administrative Procedure Act suit to vindicate the class members' collective rights to an accounting, not an action for individual damages under Rule 23(b)(3), class members have no notice or opt-out rights. See Eubanks v. Billington, 110 F.3d 87, 92 (D.C. Cir. 1997) (noting absence of notice and opt-out rights in (b)(1) and (b)(2) class actions). 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.

If, in a final judgment, this Court determines that Interior's Historical Accounting Plan fails to satisfy the requirements of the 1994 Act, any accounting that a class member received prior to that final order that failed to comply with the 1994 Act would have to be redone. Consequently, any failure by that class member to administratively appeal the original accounting she received would not matter. She may have lost the right to appeal that

hypothetically defective accounting, but as a class member, she still would be entitled to receive the accounting that complies with the 1994 Act. Therefore, any administrative process Interior instituted, including the process that was described in the transmittal letter to the 1,208 account holders who received accounting statements in 2002, and prompted the December 23, 2002 class communication order, could not extinguish any class member's rights in this litigation.[1]

Because Interior could not extinguish any class member's rights, the Court could not have been protecting a class member's right to participate in the litigation when it entered the December 23, 2002 class communication order. Because, as both Defendants and Plaintiffs agree, this is the legal standard that must be met before a Rule 23(d) order can be issued, the December 23, 2002 order was not authorized by Rule 23(d).

Similarly, nothing in any communication about Interior's land sale process could extinguish a class member's rights in this litigation. Plaintiffs erroneously claim that a land sale would extinguish class member rights because any IIM account associated with the land would be closed after the sale and this closure would terminate any right to receive an accounting. Opposition at 34-35. Plaintiffs are mistaken both about the facts and the legal effect of a land sale. Under Interior's Historical Accounting Plan, any account holder whose IIM account was open as of October 25, 1994, but not opened after December 31, 2000, will

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[1/] Plaintiffs' claim that counsel conceded that class member rights were extinguished is belied by the transcript upon which they rely. See Opposition at 9-10. The question to which counsel replied in the affirmative asked whether the people who were subject to the administrative process which required them to file an appeal within 60 days were class members. See Tr. 6:11-12. Counsel was not given an opportunity to finish his answer to the Court's preceding question about any rights that may be extinguished. See Tr. 6:8-10. Counsel later clarified that rights in this litigation were not extinguished. See, e.g., Tr. 7:17-8:6. As discussed above, any "rights" that could be extinguished by the administrative process were non-Cobell litigation rights.

receive an Historical Statement of Account, even if his or her account is later closed – for whatever reason, including the sale of any land associated with that account. See, e.g., Plan at 4. A land sale thus cannot possibly extinguish any class member rights and consequently any communication between Interior and a class member about a land sale cannot affect class member rights. Therefore, the Court could not have been preserving class member rights to participate in the litigation when it entered the September 29, 2004 class communication order. This order too, then, was unauthorized under Rule 23(d) and should be rescinded.

II. Plaintiffs Mistakenly Focus on Interior's Rulemaking Power Rather than on Communications with Class Members

Plaintiffs devote much of their Opposition to attacking the content and effect of a draft of Interior's proposed regulations that would establish and administrative appeals process for Historical Statements of Account. The issue raised by Defendants' Motion, of course, is not whether Interior has the authority to issue any particular regulation or conduct any specific administrative proceeding. No order of the Court prohibits Interior from promulgating a regulation, and neither Interior's rulemaking authority as an Executive Branch department, which derives from statutes not being challenged in this litigation, nor the propriety of any regulation is at issue here.

Rather, the present question is whether Interior may consult with, and provide notice to and receive comments from, class members who may be affected by its proposed regulations before those regulations are promulgated, and then, after regulations are adopted, whether Interior may inform affected individuals of the existence of those regulations and any administrative proceedings which they prescribe. The December 23, 2002 class communication order prohibits such consultation and informative communication if the

recipient of any such communication is a class member. As Defendants demonstrated in their Motion, under the standard which the Court of Appeals has articulated, such a prohibition cannot be squared with Rule 23.

In any event, as discussed above, Plaintiffs are mistaken about the effect of any Interior regulation or administrative proceeding. No class member rights in this litigation are, or can be, extinguished by an Interior action or regulation. All the supposed defects that Plaintiffs identify in the draft regulations, see Opposition at 2, 29-33, could be brought to the attention of Interior during the notice and comment period. Class members should not have their rights to consult and comment on these proposed rules curtailed by the class communication orders.

Plaintiffs rhetorically ask why Defendants cannot just "use the existing protocol" in the December 23, 2002 class communication order and seek "pre-clearance" of each and every communication. Opposition at 36. The more apt question is why Defendants – and the Court – should be required to shoulder this administrative and judicial burden when the class communication order which contains this "protocol" is not authorized.[2] The default position is that parties *can* communicate with each other; it is only lawyers that have ethical rules that limit communications with represented parties.[3] Rule 23(d) provides authority for a court to depart from this default position and impose conditions on class communications, but the legal

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[2] Although this "pre-clearance protocol" may not be overly burdensome in the case of proposed regulations, it would be impractical for communications by Interior personnel in the field when they are routinely faced with a potential violation of the class communication order if they respond to a class member inquiry that might arguably relate to an issue in this litigation.

[3] Curiously, Plaintiffs claim that Defendants did not address ethical rules in their Motion. Opposition at 17. Defendants' Motion discusses D.C. Rule of Professional Conduct 4.2(a) and a District of Columbia Bar Legal Ethics Committee opinion from 1997 at some length. Motion at 14-16.

standard of Rule 23(d) must be met before such an order may be entered. As discussed above, and as Defendants demonstrated in their Motion, this standard was not met here and the class communication orders are, therefore, unauthorized.

III. Plaintiffs Have Misstated the Facts Surrounding and Preceding the Class Communication Orders

Plaintiffs' Opposition contains numerous mischaracterizations about the circumstances pertaining to the class communication orders. It is unnecessary for the Court to resolve these disputed issues in order to resolve the Motion, but Defendants do not want these misstatements to go unchallenged.

Plaintiffs claim that "the record of abusive communications in this case is indisputable." Opposition at 5. Plaintiffs cite no support for this unsupportable proposition. The section of the Opposition in which this statement appears discusses Defendants' March 1, 2000 motion, in which Defendants' sought a prophylactic order to protect attorneys working on a Federal Register notice from allegations that they had violated any ethical rules by communicating with a represented party. Interior vigorously disputed the claim that the "true purpose" of this Federal Register notice was a "sham," Opposition at 5-6, and as Plaintiffs acknowledge, the Court's opinion regarding this matter was vacated on appeal. See Cobell v. Norton, 226 F. Supp. 2d 1, 34 n.30 (D.D.C. 2002), vacated, Cobell v. Norton, 334 F.3d 1128 (D.C. Cir. 2003).

Defendants' December 11, 2001 motion, discussed by Plaintiffs in their Opposition, at 7, similarly sought a prophylactic order to protect attorneys involved in a proposed consultation from an allegation that they had violated ethical rules. It is noteworthy that, although Plaintiffs also claim that this consultation process was deceptive, they cite nothing to

support their claim. Even if the consultation was not particularly effective or productive, it was not in any way deceptive or abusive.

More to the point, however, neither of these earlier motions has any bearing on whether the December 23, 2002 or September 29, 2004 class communication orders were authorized by Rule 23(d) – the subject of Defendants' Motion.

With respect to the 1,208 accounting statements that were distributed in October 2002, Plaintiffs repeatedly state that these statements were mailed to "children, elderly, and infirm members of the class," Opposition at 7, 8, 22, in an effort to extinguish the rights "of the most vulnerable members of the plaintiff class," Opposition at 9, 10. In fact, the statements were not provided to children, but were sent to the parents and guardians of the beneficiaries, a fact recognized by this Court during the November 1, 2002 hearing. See Tr. 37:14-38:9.

Plaintiffs' description – again without citation – of the land sale process that led to the September 29, 2004 class communication order, Opposition at 12 & n.20, is inaccurate. However, again, because nothing about a land sale, or any communication regarding a land sale, could possibly extinguish class member rights in this litigation, Defendants will not revisit here the facts about Interior land sales.[4]

The claim that Interior "suspended payment of trust funds to class members," Opposition at 13, has been exhaustively debunked by Interior. However, again, because this

[4] These facts can be found in *Defendants' Opposition to Plaintiffs' Motion for Temporary Restraining Order and For Preliminary Injunction* [Dkt. No. 2652]; *Defendants' Supplemental Memorandum in Opposition to Plaintiffs' Motion for Temporary Restraining Order and for Preliminary Injunction* [Dkt. No. 2680].

issue is not relevant to whether the Court's class communication orders were authorized, Interior will not revisit here the facts of this matter either.[5]

Finally, again without citation to evidence, Plaintiffs repeatedly allege that the real purpose behind Interior's Motion, and any administrative process adopted by Interior to internally handle appeals and questions about account statements, is to "derail these proceedings," Opposition at 2, "divest this Court of jurisdiction," id. at 3, 28 n.25, 30, 33, and "break-up the plaintiff class," id. at 28 n.25, 29, 35. As discussed above, the adoption of an administrative process cannot extinguish a class member's rights in this litigation. Therefore, even if Plaintiffs' allegations were true and Interior had hatched such a nefarious plot – a hypothetical obviously denied by Interior – any such plan would be doomed because Interior could not accomplish its alleged goal.

The Rule 23(d) class communication orders should be rescinded, not because this will open the door for skulduggery, but because the orders were not authorized by Rule 23(d).

CONCLUSION

For these reasons, and those in Defendants' Motion, 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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[5] The facts surrounding this claim can be found in *Defendants' Motion to Reconsider the October 22, 2004 Memorandum Opinion* [Dkt. No. 2792]; *Defendants' Reply in Support of Motion to Reconsider the October 22, 2004 Memorandum Opinion* [Dkt. No. 2815]; *Defendants' Response as Required by Order of February 7, 2005* [Dkt. No. 2845].

Dated: July 16, 2007

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on July 16, 2007 the foregoing *Defendants' Reply in Support of 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:

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