

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL et al.,)
)
 Plaintiffs,) No. 1:96CV01285 (RCL)
 v.)
)
 GALE A. NORTON, Secretary of)
 the Interior, et al.,)
)
 Defendants.)
 _____)

**INTERIOR DEFENDANTS’ NOTICE OF OBJECTIONS TO
PLAINTIFFS’ PROPOSED NOTICE TO THE CLASS OF PLAINTIFFS’ PETITION
FOR INTERIM FEES UNDER THE EQUAL ACCESS TO JUSTICE ACT**

In response to this Court’s Memorandum Opinion and Order, dated July 12, 2005, Plaintiffs submitted a filing setting forth the proposed content and means of giving notice to the Cobell class members concerning class counsel’s pending petition for an interim award of attorney fees pursuant to the Equal Access to Justice Act. See Notice of Plaintiffs' Proposed Notice to the Class of Plaintiffs' Petition for Interim Fees under the Equal Access to Justice Act (July 18, 2005) (“Pliffs.’ Notice”). Defendants respectfully object to Plaintiffs’ proposal, because it is wholly inadequate in terms of content, distribution and timing. Defendants request that the Court modify the notice as proposed and order Plaintiffs to make the following changes to the notice: (1) the notice must be disseminated more broadly than by a single Internet posting, preferably, through newspaper advertisements published throughout Indian country; (2) the notice must afford class members at least sixty (60) days to see the notice and respond to or comment upon the fee petition; and (3) the text of the notice must be revised in three areas: (I) argumentative assertions should be removed, (ii) a simple means for obtaining copies of the fee

petition and the government's opposition should be provided, and (iii) class counsel's contact number should be clearly identified as toll free.

In its Memorandum Opinion of July 12, 2005, the Court expressly recognized class counsel's obligation under Federal Rule of Civil Procedure 23(h) to notify class members of its pending motion for an interim award of attorneys fees under the Equal Access to Justice Act. The Court noted the important purposes behind such notice to class members and, quoting the Advisory Committee, observed that fee awards "are a powerful influence on the way attorneys initiate, develop, and conclude class actions." Mem. Op. at 29-30 (internal quotation marks omitted). The Court also stated, again quoting the Advisory Committee, that "members of the class have an interest in the arrangements for payment of class counsel whether that payment comes from the class fund or is made directly by another party[.]" Id. at 30 (internal quotation marks omitted). As the Court recognized, the aim of the notice rule is to provide "the class with sufficient information to question objectionable fee requests and to scrutinize any potential conflicts of interest that arise from certain payment scenarios." Id. Plaintiffs' proposal, however, falls far short of this goal.

Defendants are not aware that Plaintiffs have done anything thus far to communicate their fee request to class members. Although Plaintiffs regularly publish all manner of material on their website, Plaintiffs have chosen not to publish their fee request on their website, even though their motion for a fee award, filed August 14, 2004, is almost a year old. Having apparently done nothing to date, even informally, to inform class members of their fee petition, Plaintiffs now propose that their notice merely be posted as a message on their website, without any further dissemination or promotion. Plaintiffs also propose an unreasonably small window – barely two

weeks (until August 17, 2005) – during which class members who have seen the web posting can retrieve a copy of the fee petition and submit comments on it to the Court. This proposed scheme is wholly inadequate to satisfy the important purpose that lies behind the notice requirement.

Although Plaintiffs only propose publishing their class notice on their Internet website, class counsel has previously represented to this Court that the Internet is not an adequate vehicle for communicating with the represented class. Just last October, during a hearing regarding the class communications order, Plaintiffs' lead counsel told this Court:

Your Honor, what we've also learned from the recent few weeks of dealing with our clients with regard to the notice issues that we've [sic] wrestling with is *that very few of the them have access to the Internet, very few of them have computers*. I will also tell Your Honor that very few of them have voice mail, so communications and actual communications sometimes can be a challenge. Also, very few of them have money, so long distance telephone calls are actually quite expensive to them, and are quite meaningful to them, and for those with whom we are communicating effectively, Your Honor, *it requires many of them to drive distances to get to a facility with a fax machine or electronic means, or something where they can provide us that*.

Hearing at 7-8 (Oct 19, 2004) (emphasis added). If class counsel's statements to the Court are accepted as true, then it necessarily follows that mere website publication would be an inadequate means of notice to this class.

In their submission, Plaintiffs also tender meager excuses for not contacting class members more directly. First, they claim that this Court has ruled out mail distribution of the fee award notice. Plffs.' Notice at 1-2. That assertion, though, is simply incorrect. The Court did decide against including the Plaintiffs' fee notice with other written notice that it has ordered Interior to give class members, but this was because the Court deemed the two matters –

attorneys' fees and the information given out by Defendants – to be “not at all germane” to one another. Mem. Op. at 30. The Court, however, did not rule out mailing or any other method of distribution for Plaintiffs' notice. Instead, the Court ordered Plaintiffs to propose a dissemination plan. See id. (“The Court will, however, order that plaintiffs' counsel submit . . . a proposal for distributing that notice to class members.”)

Plaintiffs next contend that Defendants cannot identify all account holders and have “grossly mismanaged” Indian lands. They then make a leap of logic from these purported facts to say that class counsel should be relieved of the obligation to contact members of their class. Plffs.' Notice at 2-3. Plaintiffs ignore the fact that Defendants regularly issue tens of thousands of checks to IIM account holders and these individuals are highly likely to be class members whose mailing addresses are known. Plaintiffs' argument also ignores the fact that many IIM account holders can be reached through local media – including newspapers – in the Indian communities where many class members reside. Plaintiffs have no ready explanation for why they should not make an affirmative effort to contact a substantial and identifiable portion of the class' membership.

Finally, Plaintiffs point out that they are seeking payment of fees from the government through the Equal Access to Justice Act (“EAJA”), contending by way of implication that class members do not really need to know about their interim fee request. Plaintiffs expressly note that class members have “no pecuniary interest in the award” and might actually “benefit directly” from a high EAJA award because this interim award “may well be deducted from any final fee award made pursuant to the ‘common fund doctrine.’” Id. at 3. These justifications for abridging their duty to inform the class run counter to this Court's unequivocal recognition that

class members must be made aware of “arrangements for payment of class counsel whether that payment comes from the class fund *or* is made directly by another party,” and that Rule 23(h) does not draw such distinctions with respect to the notice requirement.¹ Id. at 30 (internal quotation marks omitted)(emphasis added).

Defendants submit that Plaintiffs -- in addition to posting the notice prominently at the top of the home page on their website -- should also be required to give some form of written notice to the class members. The fee award notice rule, Fed. R. Civ. P. 23(h)(1), requires notice be given “in a reasonable manner,” and it is appropriate to consider what standards have been employed for class notice in other contexts. In class action damages cases, for example, class representatives are required to give the “best notice practicable under the circumstances,” Fed. R. Civ. P. 23(c)(2)(B), which in most instances means direct contact by first-class mail. See, e.g., Peters v. Nat’l R.R. Passenger Corp., 966 F.2d 1483, 1486 (D.C. Cir. 1992) (“beyond dispute that notice by first class mail ordinarily satisfies rule 23(c)(2)'s requirement”). Defendants do not suggest that Plaintiffs should be made to send letters to several hundred thousand class members about their fee request, but they should be required to give meaningful notice to a substantial portion of the class. Publication on their website alone is not sufficient notice.

Defendants propose that Plaintiffs should also be required to render the class notice through local newspapers in addition to the website notice. The advertisements should be full page and placed with publications on Indian reservations and in areas with significant Indian populations. The advertisements should run at least twice over a two or three week period. This

^{1/} Plaintiffs’ reliance on a “common fund” contention also overlooks the reality that there is no “common fund” when, as here, Plaintiffs are seeking only injunctive relief.

is the reasonable effort required for a class notice, and it should not be unduly expensive.²

Another material defect in the notice is the brief comment period that class counsel proposes to afford to the class. The proposed period would give interested class members virtually no time at all to ask questions or express concerns. Without explanation, Plaintiffs propose August 17, 2005, as the cut-off date for comments by class members, which would be barely two weeks after publication. See Plffs.’ Notice at 4. Class members should be given no less than sixty (60) days to submit comments to the Court concerning class counsel’s fee petition. It could reasonably take a few weeks for class members to become aware of the notice, a few weeks more to obtain and review a copy of the fee petition itself, and still another few weeks to write and submit comments on the petition. The Court should act here to ensure that the notice gives a meaningful opportunity to the class for comment, which Defendants submit should be at least a sixty-day period, following final publication of the notice.

Finally, Defendants urge the Court to order three other changes in the wording of the proposed notice. The second paragraph of the proposed notice now begins, “Based on these significant court victories and because the government has acted in bad faith,” class counsel has petitioned for an award of fees. Plffs.’ Notice at 4. The second half of this introductory clause – “and because the government has acted in bad faith” – should be deleted. The “bad faith” assertion is made generally without reference to any facts that Plaintiffs have alleged. Moreover, although bad faith in the litigation has been argued by Plaintiffs as a reason justifying

² As a point of comparison, the Department of Interior recently ran full page ads in 51 newspapers to fulfill a notice requirement under the American Indian Probate Reform Act of 2004, Pub. L. 108-374. The publication cost of these advertisements was less than \$45,000. See Exhibit A (attached hereto) (AIPRA Media Buy spreadsheet and cover note).

their fee award, their contention has been disputed by Defendants and remains unresolved. The reference is a gratuitous misstatement that should not be included in a notice to the class.

Second, Plaintiffs' notice should be a clear guide to class members on how to obtain access to all additional information relevant to the pending fee award. The proposed notice appropriately discloses to class members that they can obtain a copy of the fee petition on-line by clicking on a link at Plaintiffs' website. Plffs.' Notice at 5. The notice, however, should also tell class members that they can obtain a copy of the fee petition by a telephone request to class counsel. The notice should further disclose that the government has opposed the fee petition and inform interested class members that they can obtain a copy of the government's opposition through the same means as the fee petition itself, either by visiting Plaintiffs' website or by a telephone request to class counsel. This approach will ensure that class members are fully informed of the circumstances concerning the pending fee award.

Third, Plaintiffs' proposed notice includes a telephone number with an "866" area code that people may not readily recognize as being a toll-free line. The notice should make this fact clear, so that interested class members will be aware that they can contact class counsel by telephone free of long distance charges. Class counsel has previously stated to the Court that "very few" class members have money, "so long distance telephone calls are actually quite expensive to them, and are quite meaningful to them." Hearing at 8 (Oct. 19, 2004). Given this representation, the notice to the class should inform class members that the listed number is toll free.

CONCLUSION

For the foregoing reasons, the Court should modify Plaintiffs' proposed notice to the class concerning Plaintiffs' petition for interim fees and direct that Plaintiffs make revisions to the proposed notice and distribution plan in accordance with Defendants' requested changes.

Date: July 25, 2005

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on July 25, 2005 the foregoing *Interior Defendants' Notice of Objections to Plaintiffs' Proposed Notice to the Class of Plaintiffs' Petition for Interim Fees under the Equal Access to Justice Act* 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

Actual amount
invoiced = \$41,456.91

Joel Smith
OST/Trust Program Management Center
4400 Masthead
Albuquerque, NM 87109
505-816-1368
505-816-1319 (fax)

No radio ads were purchased.

Here's the spreadsheet we talked about. The media buy only included purchasing full page ads in the newspapers listed. The amount of the buy was \$41,000 - not the \$46,000+ on this spreadsheet. The 46,000 represented what G&G advertising was quoted from each newspaper, the 41,000 reflects the total amount invoiced (tear sheets) from the various newspapers.

Joel Smith
To: Denise Desiderio/ASIA/OS/DOI@DOI
cc: Subject: AIPRA media buy
07/25/2005 01:06 PM

----- Forwarded by Joel Smith/OST/OS/DOI on 07/25/2005 01:49 PM -----

Joel Smith
OST/Trust Program Management Center
4400 Masthead
Albuquerque, NM 87109
505-816-1368
505-816-1319 (fax)

OST media option 6.xls

Joel Smith/OST/OS/DOI@DOI
07/25/2005 03:54 PM
To: Denise Desiderio/DC/BIA/DOI@BIA
cc
bcc
Subject: Fw: AIPRA media buy

Native Print

		Rate for Full Page Ad:	April				TOTAL Inserts	Extended Cost:	Circulation
			4	11	18	25			
National									
Indian Country Today (wkly)	Nat'l	\$ 3,760.50	1			1	\$ 3,760.50	15,000	
News From Indian Country (bi-wkly)	Nat'l	\$ 1,840.00	1			1	\$ 1,840.00	8,000	
Total National Publications: 2									

Regional Print

Eastern Woodlands		Rate	April				TOTAL	Extended Cost:	
Poarch Creek News (mo)	AL	\$ -	1			1	\$ -		
Seminole Tribune (bi-wkly)	FL	\$ 632.50	1			1	\$ 632.50	6,000	
The County Record (wkly)	FL	\$ 741.75	1			1	\$ 741.75	N/A	
Wacola News (wkly)	FL	\$ 897.51	1			1	\$ 897.51	5,400	
Win Awenen Nisitotoung (evry 3rd week)	MI	\$ 552.00		1		1	\$ 552.00	14,800	
Bay Mills News (mo)	MI	\$ 299.00	1			1	\$ 299.00	3,000	
Ojibwe News (wkly)	MN	\$ 2,829.00	1			1	\$ 2,829.00	8,500	
Anishinaabeg Today (bi-wkly)	MN	\$ 345.00	1			1	\$ 345.00	11,050	
Carolina Indian Voice (wkly)	NC	\$ 575.00	1			1	\$ 575.00	6,000	
Indian Time (wkly)	NY	\$ 368.00	1			1	\$ 368.00	1,500	
Menominee Nation News (Bi-wkly)	WI	\$ 441.60	1			1	\$ 441.60	1,445	
Ojibwe Akiing (mo)	WI	\$ 1,207.50	1			1	\$ 1,207.50	1,500	
Total Eastern Woodlands Publications: 12									

Northwest

		Rate	April				TOTAL	Extended Cost:	
Sho-Ban News (wkly)	ID	\$ 1,207.50	1			1	\$ 1,207.50	350	
Confederated Umatilla Journal (mo)	OR	\$ 194.35	1			1	\$ 194.35	7,500	
Spilyay Tymoo (bi-wkly)	OR	\$ 690.00	1			1	\$ 690.00	3,500	
Nugguam-Quinalt Nation News (mo)	WA	\$ 134.55	1			1	\$ 134.55	1,600	
Puyallup Tribal News (mo)	WA	\$ 1,840.00	1			1	\$ 1,840.00	5,000	
Yakima Nation Review (bi-wkly)	WA	\$ 362.25	1			1	\$ 362.25	4,200	
Total Northwest Publications: 7									

Native Print

Plains		Rate for Full Page Ad:	April				TOTAL Inserts	Extended Cost:	
			4	11	18	25			
Southern Ute Drum ((bi-wkly)	CO	\$ 724.50	1			1	\$ 724.50	N/A	
Echo Community News (mo)	CO	\$ 57.50	1	1		1	\$ 57.50	1,200	
Big Horn County News (wkly)	MT	\$ 880.99	1			1	\$ 880.99	2,310	
Char-Koosta News (wkly)	MT	\$ 718.75	1			1	\$ 718.75	4,000	

Turtle Mt. Times (wkly)	ND	\$ 724.50	1	1	\$ 724.50	2,350
Niobrara Tribune (wkly)	NE	\$ 215.63	1	1	\$ 215.63	500
Elko Daily Free Press (daily)	NV	\$ 1,328.70	1	1	\$ 1,328.70	8,400
Ely Daily Times (3x/wk)	NV	\$ 1,327.73	1	1	\$ 1,327.73	1,700
Absentee Shawnee News (mo)	OK	\$ 460.00	1	1	\$ 460.00	1,600
Carnegie Herald (wkly)	OK	\$ 347.30	1	1	\$ 347.30	1,852
Cherokee Observer (mo)	OK	\$ 609.50	1	1	\$ 609.50	2,000
Oklahoma Indian Times (mo)	OK	\$ 2,451.80	1	1	\$ 2,451.80	N/A
Delaware Indian News (qrly)	OK	\$ 345.00	1	1	\$ 345.00	5,000
Sisseton Courier (wkly)	OK	\$ 575.00	1	1	\$ 575.00	3,100
Black Hill's People's News (wkly)	SD	\$ 747.50	1	1	\$ 747.50	10,000
Eagle Butte News (wkly)	SD	\$ 381.80	1	1	\$ 381.80	2,400
The Spectrum (daily)	UT	\$ 2,079.50	1	1	\$ 2,079.50	23,500
Wind River News (wkly)	WY	\$ 460.00	1	1	\$ 460.00	1,500

Total Plains Publications: 18

15,193.70

Southwest		Rate	April	TOTAL	Extended Cost:	
Ak-Chin O'odham Runner (bi-wkly)	AZ	\$ 172.50	1	1	\$ 172.50	1,500
Arizona Native Scene (mo)	AZ	\$ 920.00	1	1	\$ 920.00	10,000
Fort Apache Scout (bi-wkly)	AZ	\$ 280.32	1	1	\$ 280.32	3,000
Gila River Indian News (bi-wkly)	AZ	\$ 920.00	1	1	\$ 920.00	5,000
Navajo-Hopi Observer (wkly)	AZ	\$ 1,409.33	1	1	\$ 1,409.33	13,500
Navajo Times (wkly)	AZ	\$ 1,322.50	1	1	\$ 1,322.50	19,500
San Carlos Apache Moccasin (wkly)	AZ	\$ 1,122.98	1	1	\$ 1,122.98	2,150
Seminole Producer (daily)	AZ	\$ 791.15	1	1	\$ 791.15	5,500
Hopi Tutuveni (bi-wkly)	AZ	\$ 572.70	1	1	\$ 572.70	6,500
Winslow Mail (wkly)	AZ	\$ 1,053.29	1	1	\$ 1,053.29	4,010
The Daily Times (daily)	NM	\$ 2,657.42	1	1	\$ 2,657.42	18,000
Gallup Independent (daily)	NM	\$ 2,076.90	1	1	\$ 2,076.90	N/A

Total Southwest Publications: 12

TOTAL PUBLICATIONS: 51

13,299.00

28,492.70