

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,)	
)	
Plaintiffs,)	
)	Civil Action No. 96-1285 (RCL)
v.)	
)	
DIRK KEMPTHORNE, Secretary of)	
the Interior, et al.,)	
)	
Defendants.)	

**DEFENDANTS' RESPONSE TO PLAINTIFFS' OPPOSITION TO MOTION
TO COMPEL ATTORNEYS TO SIGN STATEMENT OF NON-PARTY OR RELEASE
EDDIE JACOBS AND ORDER RECONCILIATION AND REIMBURSEMENT**

On August 30, 2006, Mr. Eddie Jacobs, a member of the Cobell class, filed a motion with this Court seeking to have the Court compel Plaintiffs' counsel to sign a "Statement of Non-Party Or Release" for Mr. Jacobs and for an Order for reconciliation and reimbursement by Defendants. This motion is the latest in a long series of documents generated since at least 1998 by Mr. Jacobs through which he has attempted to disassociate himself from this litigation and recover individual money damages.¹

On September 15, 2006, Plaintiffs filed an opposition to Mr. Jacobs' motion ("Opp."). In their brief, Plaintiffs make several contentions against both Mr. Jacobs and the Department of the Interior that are misleading or incorrect and, if not addressed, could lead the Court to misunderstand the circumstances surrounding the unique situation involving Mr. Jacobs.

¹ See, e.g., Jacobs' July 8, 2003 Motion for Leave to File Amicus Curiae Pro Se (Docket No. 2127; denied, Docket No. 2666, Sept. 2, 2004); Jacob's Feb. 10, 2005 Motion for Leave to File Under Seal Eddie Jacob's Individual Indian Money Account Documents (No Docket Number).

Accordingly, Defendants provide the following brief response to Plaintiffs' opposition brief.

Plaintiffs initially assert that Mr. Jacobs did not meet and confer with class counsel and did not represent in his motion that he met and conferred with defendants or their counsel before filing his motion. Opp. at 1 n. 1. While Mr. Jacobs did not meet and confer with the undersigned counsel for Defendants, it is wrong to imply, as Plaintiffs do, that the blame for these recent filings rests with Mr. Jacobs because of his failure to communicate with Plaintiffs' counsel. Plaintiffs chide Mr. Jacobs by stating that, "[p]erhaps if Mr. Jacobs had met and conferred with plaintiffs' counsel prior to filing the Motion, he would have had a better understanding of the status of the case and this exercise would have been unnecessary." Opp. at 2 n. 6. This statement is misleading because it ignores that Mr. Jacobs had attempted to confer with Plaintiffs' counsel through written correspondence.

Mr. Jacobs' declaration states that he wrote to Plaintiffs' counsel about this matter in March, 2006, but they did not answer him. Declaration at 2. A response from Plaintiffs' counsel might have given Mr. Jacobs "a better understanding of the status of the case," and made this exercise unnecessary.

Notably, in February 2006 - well before the March meeting attended by Mr. Jacobs and the Department of the Interior senior officials to which he alludes in his motion - Defendants' counsel specifically requested that Plaintiffs' counsel contact Mr. Jacobs to inform him that Interior's senior officials could not respond directly to Mr. Jacobs' claims for a reconciliation and reimbursement. Attachment A. This request was precipitated by Mr. Jacobs' January 2006 written communication to the Special Trustee, Mr. Ross Swimmer, and others seeking that reconciliation and reimbursement. Following Mr. Jacobs' written request to Interior, the

undersigned wrote to Plaintiffs' counsel on February 22, 2006, and requested that they contact Mr. Jacobs to inform him that the Department of the Interior could not respond directly to Mr. Jacobs' correspondence because he is a member of the plaintiff class in Cobell. Attachment A. We are unaware of whether class counsel ever acted upon this information, and Mr. Jacobs' present motion suggests that he did not hear from them.

Instead of working with Mr. Jacobs, Plaintiffs use his motion as an opportunity to portray Interior as threatening, contemptuous, and acting in bad faith. In doing so, they fail to disclose that Defendants asked them to address this matter with Mr. Jacobs well over six months ago, and distort Mr. Jacobs' assertions. Plaintiffs wrongly claim that Mr. Jacobs "says that he was approached by senior Interior Department officials" during a meeting in Oklahoma. Opp. at 4. Mr. Jacobs did not state that he "was approached" by officials from the Department of the Interior. Instead, in both his motion and his declaration, Mr. Jacobs merely states that he

made a presentation to the Intertribal Monitoring Association (ITMA) Meeting on trust funds issues hosted by the Comanche Nation in Lawton, Oklahoma (Statement of Eddie Jacobs Iim Beneficiary attached hereto as Exhibit C). Ross Swimmer, Special Trustee and Donna Erwin, Deputy Trustee, Office of Special Trustee, United States Department of Interior were present at the ITMA meeting.

Mot. at 3; Jacobs Declaration at 1; Exhibit D at 1. Further, a review of the presentation he made at the meeting shows that it was Mr. Jacobs, before the assembled participants, who raised the fact that Mr. Swimmer had not acted on his earlier request for a reconciliation and reimbursement. Exhibit C. In light of these circumstances, Plaintiffs' suggestion that Mr. Swimmer and other senior officials may have made "a contemptuously improper class communication" is, at best, ill-conceived.

Similarly, Plaintiffs' counsel at first acknowledge that they are "unable to confirm that he [Mr. Jacobs], in fact, had been threatened by Special Trustee Ross Swimmer, and Deputy Special Trustee Donna Erwin, that no accounting would be rendered . . .," Opp. at 3 n. 7. Nevertheless, one page later, Plaintiffs make the groundless accusation that obstructing class members' ability to retain relief in this litigation is Interior's "obvious objective given their threat to continue to withhold Mr. Jacobs' historical accounting." Opp. at 4 (emphasis added). Rather than heed the court of appeals' recent admonition to focus "on legal issues rather than on attacking the government and its lawyers," Cobell v. Kempthorne, 455 F.3d 317, 335 (D.C. Cir. 2006), Plaintiffs have again taken aim without cause. No reasonable basis exists to conclude that Mr. Jacobs was faced with a "threat" to have his historical accounting handled differently than any of the other Cobell class members. There is also no basis for Plaintiffs' inflammatory assertion that Interior's objective is to obstruct the historical accounting. Contrary to Plaintiffs' assertions, Opp. 3, fn. 8, accountings have been completed, the historical accounting is ongoing, and Interior is awaiting the Court's permission to mail completed Statements of Account that were submitted to the Court many months ago.

Mr. Jacobs' motion and its attachments demonstrate only that it has been Mr. Jacobs who has repeatedly attempted to establish direct communications with Mr. Swimmer and other Interior officials in an attempt to have his IIM account information considered by the Department of the Interior apart from the Cobell litigation. See Jacobs Declaration at 3-4, 6-7. Since at least 1998, Mr. Jacobs and Plaintiffs' counsel have been informed by the Government that, because he is a member of the plaintiff class in Cobell, Interior cannot communicate directly with him about his claims for reconciliation and reimbursement. Attachments B and C.

That Mr. Jacobs has persisted in attempting to bring his claims to the attention of Mr. Swimmer and others presents no reasonable basis to raise the specter of a violation of any communications order in this case.²

Dated: September 21, 2006

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General
STUART E. SCHIFFER
Deputy Assistant Attorney General
J. CHRISTOPHER KOHN
Director

Robert E. Kirschman, Jr.
ROBERT E. KIRSCHMAN, JR.
(D.C. Bar No. 406635)
Assistant Director
Commercial Litigation Branch
Civil Division
P.O. Box 875
Ben Franklin Station
Washington, D.C. 20044-0875
Telephone: (202) 307-0494
Facsimile: (202) 514-7162

² Although we presume that it is not necessary, should the Court want further factual information regarding events at the March 21, 2006 ITMA meeting, Defendants are prepared to provide that information.

CERTIFICATE OF SERVICE

I hereby certify that, on September 21, 2006 the foregoing *Defendants' Response to Plaintiffs' Opposition to Motion to Compel Attorneys to Sign Statement of Non-Party or Release Eddie Jacobs and Order Reconciliation and Reimbursement* 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 Justice
Civil Division
Commercial Litigation Branch

Robert E. Kirschman, Jr.
Assistant Director

P.O. Box 875, Ben Franklin Station
Washington, D.C. 20044-0875

Tel: (202) 616-0328
Fax: (202) 307-0494
Email: Robert.Kirschman@usdoj.gov

February 22, 2006

BY FACSIMILE

Dennis M. Gingold, Esq.
607 14th Street, NW
Box 6
Washington, DC 20005

Re: Mr. Eddie Jacobs

Dear Mr. Gingold:

I enclose a copy of correspondence that was received by the Department of the Interior from Mr. Eddie Jacobs, one of the members of the class you represent in Cobell v. Norton. In the correspondence, Mr. Jacobs demands "reimbursement to [his] father's USGS and IIM accounts and [his own] IIM account in an amount to be determined by an unbiased accounting . . ." Mr. Jacobs seeks the payment of "lost principal and interest, past and accruing interest at the highest legal rate," and requests that the Department of the Interior respond to his demand "by written reply."

We request that, in your capacity as class counsel in Cobell, you convey to Mr. Jacobs that, because he is a member of the plaintiff class in Cobell, we believe that it would be improper for the Department of the Interior to respond to Mr. Jacobs directly regarding the demands for reimbursement set forth in his correspondence. If you have a different understanding, please let us know.

Thank you for your attention to this matter.

Very truly yours,

Robert E. Kirschman, Jr.

Enclosure

cc: Keith Harper, Esq. (by facsimile)



U.S. Department of Justice

Environment and Natural Resources Division

General Litigation Section
P.O. Box 663
Washington, DC 20044-0663

Telephone (202) 305-0504
Facsimile (202) 305-0506

July 10, 1998

Robert M. Peregoy, Esq.
Native American Rights Fund
1712 N Street, N.W.
Washington, D.C. 20036-2976

Re: Eddie Jacobs

Dear Mr. Peregoy:

The Department of the Interior received the enclosed materials from Eddie Jacobs, an IIM account holder. Mr. Jacobs' inquiries appear to involve his IIM account.

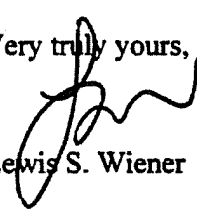
In communications initiated by Mr. Jacobs, he has represented that he does not consider himself to be a plaintiff in the Cobell class action or to be represented by you or your co-counsel. As you know, the Cobell class was not certified as an opt-in or opt-out class. Our reading of the Court's class certification leads us to conclude that Mr. Jacobs is a plaintiff in the Cobell lawsuit. Accordingly, we believe that it would be improper for us to communicate directly with Mr. Jacobs regarding the matters addressed in this correspondence.

Should our understanding of the scope of the class certification be incorrect or should you elect to allow us to communicate directly with Mr. Jacobs, please let us know.

In addition to the specific case of Mr. Jacobs, we understand that OTFM has received inquiries from other IIM account holders who have represented that they do not consider themselves to be plaintiffs in the Cobell lawsuit or to be represented by you and your colleagues. We together must determine the best and most appropriate way to respond to these individuals.

If you have any questions or need to discuss this matter further, please feel free to give me a call.

Very truly yours,


Lewis S. Wiener

enclosures

cc: Dennis Gingold, Esq. (w/o enclosures)
Dianne Shaugnessey
Edith R. Blackwell, Esq.

ATTACHMENT B

Defendants' Response to Plaintiffs' Opposition to Motion to Compel
Attorneys to Sign Statement of Non-Party or Release Eddie Jacobs
and Order Reconciliation and Reimbursement.



United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

October 16, 1998

Mr. Eddie Jacobs
P.O. Box 25665
Oklahoma City, OK 73125-0665

Dear Mr. Jacobs:

This letter responds to the issues you raised in your April 16 and July 6, 1998 correspondence to Dianne Shaughnessy, a member of the Indian Minerals Steering Committee. We appreciate your efforts in raising these issues to the attention of our committee.

Reconciliation of Individual Indian Money Accounts

In your April correspondence, you restate your prior request for reconciliation of yours and your deceased father's IIM accounts, and assert that you are not part of the *Cobell v. Babbitt* class action lawsuit. As Ms. Shaughnessy discussed with you in July, the Department of Justice has concluded that you are a plaintiff in this lawsuit, and therefore it would be improper for us to communicate with you regarding the matters addressed in your correspondence relating to the IIM accounts. In July, the Department of Justice forwarded your letter and its enclosures to the attorneys representing the plaintiff in the IIM lawsuit, Robert Peregoy of the Native American Rights Fund. The address and telephone number of NARF are 1712 N Street, NW, Washington, DC 20036-2976 (telephone 202-785-4166).

Taxation Issues

Since the Oklahoma gross production tax on members of the Five Civilized Tribes is authorized by an Act of Congress, and since the Act has not been successfully challenged, the Department must presume it is lawful.

The Office of Trust Funds Management is taking the necessary steps to issue SF 1099 to members of the Five Civilized Tribes for tax year 1998.

Tribal Settlement Legislation

There are two provisions in the tribal settlement legislation that have some tie to individual Indian money accounts. However, these provisions are not intended to settle or solve potential IIM claims which are currently the subject of a class action lawsuit.

ATTACHMENT C

Defendants' Response to Plaintiffs' Opposition to Motion to Compel
Attorneys to Sign Statement of Non-Party or Release Eddie Jacobs
and Order Reconciliation and Reimbursement

~~EXHIBIT 28, 29, 30~~

As we explained to Congress, Section 15 of H.R. 3782 is largely aimed at correcting the overall books of the Government, to ensure that the aggregate balances in U.S. Treasury accounts equal the sum of the underlying positive balances in both individual and tribal trust fund accounts. The Department's and the Treasury's books are not in agreement as a result of historic inadequacies in systems, policies, practices, and procedures. Correction of these book differences is an integral part of our trust reform efforts. For the most part, we expect these provisions to result in aggregate account level adjustments. Potentially, implementation of these provisions could result in some adjustments to an underlying account. However, we do not expect such adjustments to be significant. Section 16 provides a mechanism to address routine administrative errors prospectively.

There are two reasons these provisions are included in the tribal settlement legislation. The Special Trustee's Advisory Board recommended that the Tribal Settlement Legislation address these accounting variances, which the Department agreed with in both its 1996 and 1997 reports to Congress. Additionally, we had anticipated that both the tribal settlement legislation and the correction of these accounting discrepancies could potentially have significant "pay-as-you-go" implications under the Budget Enforcement Act, and as such would require offsetting reductions in expenditures or increases in receipts. However, ultimately, the "pay-as-you-go" impact of these provisions was limited.

Notification of Class Action Suit

The Court certified the class under the Federal Rules which do not require class notification or an opportunity to opt in or out of the class unless provided by the Court. As noted above, since accountholders are represented by their attorneys, it is improper for the Department to communicate with accountholders regarding the lawsuit.

Farmington, NM Project [FIMO]

The Department has a pilot in Farmington to test some new approaches to better serve mineral owners. Once the pilot ends and it is assessed, the Department will determine if some concepts and approaches should be implemented elsewhere.

Status of the Office of the Special Trustee

The paramount task of the Special Trustee is to develop a Comprehensive Strategic Plan for all phases of the trust fund cycle. Additionally, in 1996, at the direction of the Congress, the Office of Trust Funds Management was transferred from the Bureau of Indian Affairs to the Office of the Special Trustee. The Special Trustee submitted his strategic plan to the Secretary and the Congress in April 1997.

The Secretary has supported many aspects of the Special Trustee's plan: acquisition of trust systems, records clean-up, and elimination of trust asset processing backlogs. A

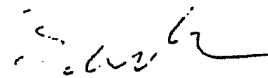
comprehensive high-level implementation plan for the 13 subprojects that comprise the Trust Management Improvement Project was completed in July 1998. Several of the subprojects are well underway. The Secretary did not support full implementation of the plan. Most notably, the Secretary opposed the creation of the American Indian Trust and Development Administration (AITDA), a new Government Sponsored Enterprise (GSE) subject to Congressional oversight, with authority, responsibility and funding of all Indian trust activities (BIA, BLM, MMS, OST). A copy of the plan is enclosed.

Selection of Mineral Owners to be Paid for BIA Conference

The Department will fund only one allottee representative per Agency to speak at conferences. The issue was lease competitiveness and each BIA Agency made the recommendation with respect to whose expenses would be paid.

We hope that his letter has been responsive to the issues that you have raised.

Sincerely,



Edward B. Cohen, Chair
Indian Minerals Steering Committee

Enclosure