

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,

Plaintiffs,

v.

KEN SALAZAR, Secretary of
the Interior, et al.,

Defendants.

No. 1:96CV01285
(Judge Robertson)

**INTERIOR DEFENDANTS' UNOPPOSED MOTION FOR
PERMISSION TO COMMUNICATE WITH CLASS MEMBERS**

On December 8, 2009, the parties announced a tentative settlement in this case. To provide information regarding the proposed settlement of this litigation, certain officials from the Department of the Interior (Interior) desire to communicate with class members. Because the Court's orders forbid such communications, Interior Defendants and their counsel now ask the Court for an order permitting their communication with class members to promote a better understanding of the terms of the settlement.¹ The Interior officials covered by this unopposed motion are Secretary Ken Salazar; Deputy Secretary David Hayes; Solicitor Hilary Tompkins; and the staff of Interior's Call Center. Also covered by this motion are, from the U.S. Department of Justice, Associate Attorney General Thomas Perrelli and Senior Counsel to the Associate Attorney General, Brian Hauck.

^{1/} Defendants' counsel conferred with Plaintiffs' counsel about this motion on April 1, 2 and 5, 2010. Plaintiffs do not oppose this motion.

BACKGROUND

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, absent an order from the Court permitting communication.² On September 29, 2004, the Court amended the December 23, 2002 Order to include a ban on communications regarding the sale or transfer of land. Subsequently, on June 22, 2007, Defendants moved to have the Court rescind or, in the alternative, to amend the class communication orders. [Dkt. No. 3348]. Defendants' motion was based on the D.C. Circuit's decision in Cobell v. Kempthorne, 455 F.3d 317 (D.C. Cir. 2006), as well as the Department of the Interior's desire to develop regulations related to trust management that would require consultations and notice and comment that would likely include communications with Cobell class members. On March 25, 2008, the Court denied without prejudice the motion to rescind or amend the class communication orders, for the administrative convenience of the Court. [Dkt. No. 3516]. The Court noted that it would "consider issues related to future communications between defendants and class members after concluding the remedies phase of this case."

DISCUSSION

The December 23, 2002 and September 29, 2004 orders ban communications with class members, absent prior permission from the Court. In particular, the December 23, 2002 Order provides that:

during the pendency of the instant litigation, the parties to the litigation, their agents and officials, and their counsel shall not communicate, through the United States mail or any other mode of communication, with any class member

² Although the court's order stated that it applied to "the parties to the litigation," it has always been interpreted to apply only to Defendants.

in this litigation regarding this litigation or the claims involved therein, except as specifically permitted by order of this Court.

Order of December 23, 2002 at 18-19. The September 29, 2004 Order provides that:

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

Any communication about the proposed settlement of this litigation necessarily involves communication “regarding this litigation or the claims involved therein” and thus could run afoul of the December 23, 2002 Order. Also, because land consolidation is a prominent feature of the proposed settlement, communications regarding this aspect of the settlement might violate the September 29, 2004 Order.

As the Court is aware, in accordance with the terms of the proposed settlement, enactment of legislation is necessary before the tentative settlement can be presented to the Court for its determination whether preliminary approval of the settlement should be granted. As of this date, the necessary legislation has not been enacted. Meanwhile, likely class members are raising questions regarding the terms of the settlement and Congress has urged that, in addition to the efforts of plaintiffs’ counsel, the Department of the Interior undertake

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).

outreach efforts to answer those questions. Video of hearing before the Full Committee on the Proposed Settlement of the Cobell v. Salazar Litigation, House of Representative's Natural Resources Committee, 111th Cong. (March 5, 2010), at 01:31- 01:38 (Rep. Hastings: "I encourage you to continue your outreach").⁴ Interior agrees that such outreach could promote a better understanding of the terms of the settlement. Interior's communications with class members may not, however, all occur with class counsel present. Plaintiffs' counsel has previously approved similar specific communications and the Court authorized those orally on March 16, 2010. Further communications between Interior and the plaintiff class will continue to benefit the settlement process.

CONCLUSION

For these reasons, and pursuant to the terms of the December 23, 2002 Order and the March 25, 2008 Order, Interior Defendants respectfully ask that the Court grant its motion and issue an order permitting the individuals identified in the opening paragraph of this motion to communicate with class members regarding the tentative settlement, including communications that involve discussion about the claims in this litigation and the transfer or sale of Indian land.

Dated: April 6, 2010

Respectfully submitted,
TONY WEST
Assistant Attorney General
MICHAEL F. HERTZ
Deputy Assistant Attorney General

⁴ The video is available at http://resourcescommittee.house.gov/index.php?option=com_jcalpro&Itemid=27&extmode=view&extid=333.

J. CHRISTOPHER KOHN
Director

/s/ Robert E. Kirschman, Jr. _____
ROBERT E. KIRSCHMAN, JR.
Deputy Director
D.C. Bar No. 406635
Commercial Litigation Branch
Civil Division
P.O. Box 875
Ben Franklin Station
Washington, D.C. 20044-0875
(202) 616-0328

CERTIFICATE OF SERVICE

I hereby certify that, on April 6, 2010 the foregoing *Interior Defendants' Unopposed Motion for Permission to Communicate with Class Members* 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

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This matter comes before the Court on the *Interior Defendants’ Unopposed Motion for Permission to Communicate with Class Members*. Upon consideration of the motion and the representations therein, the entire record of this case, and having determined that the motion is well-taken and should be granted, it is hereby

It is **FURTHER ORDERED**, that U.S. Department of the Interior Secretary Ken Salazar, Deputy Secretary David Hayes, Solicitor Hilary Tompkins and the staff of the Department of the Interior Call Center are permitted to communicate with Cobell class members regarding the tentative settlement in this case.

It is **FURTHER ORDERED**, that U.S. Department of Justice Associate Attorney General Thomas Perrelli and Senior Counsel to the Associate Attorney General, Brian Hauck, are permitted to communicate with Cobell class members regarding the tentative settlement in this case.

SO ORDERED.

James Robertson
UNITED STATES DISTRICT JUDGE
Date: April ____, 2010