

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____	)	
ELOUISE PEPION COBELL, <i>et al.</i> ,	)	
	)	
Plaintiffs,	)	Civil Action No. 96-1285 (RCL)
	)	
v.	)	
	)	
GALE A. NORTON, <i>et al.</i> ,	)	
	)	
Defendants.	)	
_____	)	

**DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR
EXPEDITED CLARIFICATION OR, IN THE ALTERNATIVE,
MODIFICATION OF THE DECEMBER 23, 2002 ORDER**

INTRODUCTION

Defendants' Motion For Expedited Clarification Or, In The Alternative, Modification Of The December 23, 2002 Order ("Motion"), filed July 23, 2004, explained that the Department of the Interior ("Interior") and the Quapaw Tribe of Oklahoma ("Tribe") have settled litigation pending in another court through a settlement agreement ("Settlement Agreement"). Under the Settlement Agreement, the Tribe's not-for-profit Tribal enterprise, Quapaw Information Systems ("QIS"), will be awarded a contract (the "OHTA Contract") to identify, select, and analyze documents, and to prepare an analysis (the "Quapaw Analysis") of the government's management of the Tribe's trust fund accounts and certain non-monetary land and natural resources assets held in trust for the Tribe and eight individual members of the Tribe ("Eight Individuals"). Motion at 2 (citing Settlement Agreement, Art. 1, ¶ 1). The Motion further explained that, in carrying out the OHTA Contract, the Tribe's enterprise, QIS, will likely need to have occasional limited contacts with the Eight Individuals concerning their non-monetary trust

assets. Defendants therefore thought it best to explain the situation to Plaintiffs and this Court and to seek clarification that the limited contacts contemplated between the Tribe's enterprise and the Eight Individuals would not violate this Court's December 23, 2002 Order ("December Order").

As explained below, Plaintiffs filed no opposition to Defendants' Motion within the time permitted by the Local Rules, and did not move for an enlargement of time. Accordingly, they have waived their opportunity to respond to Defendants' Motion, and the Court may treat the Motion as conceded.

In their untimely Opposition To Defendants' Motion Seeking Permission To Communicate With Class Members In Violation Of The December 23, 2002 Order ("Opposition"), filed August 9, 2004, Plaintiffs assert that the contacts contemplated between the Tribe's enterprise and the Eight Individuals are unnecessary and unjustified, that the subject matter of the potential contacts would improperly overlap with issues in this case and adversely affect the rights of class members, and that the Defendants are seeking "continuous, unbridled and unmonitored communications" between class members and Defendants, its agents, and contractors. Opposition at 2, 6-7.

Even if the Court decides to consider Plaintiffs' untimely Opposition, their objections to Defendants' Motion are baseless. As explained in Defendants' Motion and further below, limited communications between the Tribe's enterprise and the Eight Individuals are necessary to complete the Quapaw Analysis, which is the primary feature of the Quapaw settlement – a feature the Tribe believed necessary to achieving the settlement's goals, and a feature without which the settlement will fail. Moreover, the Plaintiffs have previously provided assurances to

the Tribe that issues concerning the non-monetary assets of individual Quapaw members are outside the scope of this case and appropriate for the Tribe to resolve independently with the United States. Finally, and most importantly, because neither the Settlement Agreement nor the OHTA Contract resolves or requires a waiver of any rights or claims of the Plaintiffs in this case, Plaintiffs' concerns about the limited contacts between the Tribe's enterprise and the Eight Individuals are unjustified. Indeed, the settlement documents clearly reflect that the Tribe and the United States made a very conscious effort to ensure that their settlement did not prevent any of the Cobell class members from obtaining the relief sought in this case. Accordingly, Defendants respectfully request that their Motion be granted so that the Tribe and the United States can move forward with implementation of their Settlement Agreement.

ARGUMENT

I. The Court Should Treat Defendants' Motion As Conceded Because Plaintiffs Failed To File A Timely Opposition.

Defendants filed and served their Motion on Friday, July 23, 2004. The time for the filing of an opposition brief is dictated by Local Civil Rule 7(b), which provides that any brief in opposition to a motion must be served and filed "within 11 days of the date of service" of the original motion. LCvR 7(b). Pursuant to Federal Rules of Civil Procedure 6(e) and 5(b)(2)(D), an additional three days is permitted to respond to a motion served by electronic means. Accordingly, Plaintiffs' Opposition was due on or before Friday, August 6, 2004. Plaintiffs did not seek leave of court to file out of time, and did not file their Opposition until Monday, August 9, 2004. Accordingly, Plaintiffs have waived their opportunity to respond to Defendants' Motion,

and the Court should treat the Motion as conceded. See LCvR 7(b) ("If [an opposition] is not filed within the prescribed time, the court may treat the motion as conceded.").

II. Even If The Court Decides To Consider Plaintiffs' Untimely Opposition, Their Objections To The Contemplated Contacts Between The Tribe's Enterprise And The Eight Individuals Are Without Merit.

A. Plaintiffs' Assertion That The Communications At Issue Are Unnecessary And Unjustified Is Unsupportable.

Plaintiffs blithely assert that the communications for which clarification is sought are unnecessary and unjustified. Opposition at 2, 7. To the contrary, as Defendants explained in their Motion, the viability of the Settlement Agreement is contingent on the Tribe's enterprise having occasional contacts with the Eight Individuals about their non-monetary trust assets. Moreover, as explained in Defendants' Motion, the Tribe considered such contacts necessary in order to adequately prepare the Quapaw Analysis, which is the heart of the Settlement Agreement. Plaintiffs' assertion that the contemplated communications are unnecessary and unjustified is unsupportable.

B. Plaintiffs' Counsel Have Long Been Aware Of The Settlement Discussions Between The Tribe And The United States And Have Conceded That Issues Concerning The Non-Monetary Assets Of Individual Quapaw Members Are Outside The Scope Of This Case And Appropriate For The Tribe To Resolve Independently With The United States.

In categorically opposing the limited communications at issue, and claiming that such contacts would imperil the rights of class members, Plaintiffs' counsel are unfairly ambushing this settlement at the eleventh hour. Plaintiffs' counsel have long been aware that Interior's management of the Tribe's members' non-monetary trust assets was of significant importance to the Quapaw Tribe and central to the Tribe's settlement goals. Defendants are aware that the

Tribe kept Plaintiffs' counsel informed of the major developments throughout the settlement process. Defendants are unaware of any point, prior to the filing of their Opposition, at which Plaintiffs' counsel expressed any objection to the Tribe's inclusion of the non-monetary trust assets of individual Quapaw members as part of its settlement efforts. Indeed, Plaintiffs' counsel even wrote to the Tribe's Chairperson in April 2002, affirming that the non-monetary trust assets of individual Quapaw members would be an appropriate focus of the Tribe's settlement efforts:

To the extent that the Quapaw Tribe wants to discuss with the United States the possibility of resolving its members' damages claims for losses sustained as a result of the government's mismanagement of individual Indian trust lands and other natural resources (*e.g.*, lead and zinc), such claims are not now within the scope of the *Cobell* action. Therefore, discussions between your tribe and the government on such issues would not be in conflict with *Cobell* and would be appropriate for the Quapaw Tribe to resolve independently with the government.

Letter from Keith Harper, Counsel for Plaintiffs, to Tamara Summerfield, Chairperson, Quapaw Tribe of Oklahoma, at 2 (Apr. 10, 2002) (attached as Exhibit A to Brief For *Amicus Curiae* The Quapaw Tribe Of Oklahoma (O-Gah-Paw) and attached hereto as Exhibit 1 for the Court's convenience).

Inasmuch as Plaintiffs' counsel stated expressly that it was appropriate for the Tribe to seek a settlement of its members' non-monetary asset claims, it is inexplicable that they should now object to the limited relief sought in this Motion.

C. Plaintiffs Greatly Exaggerate The Nature, Scope, And Effect Of The Contemplated Contacts Between The Tribe's Enterprise And The Eight Individuals.

Plaintiffs greatly exaggerate the nature, scope, and effect of both the contemplated contacts between the Tribe's enterprise and the Eight Individuals and the relief Defendants seek.

Plaintiffs claim that Defendants “ask that they and their contractors be given unfettered and unmonitored authority to discuss with class members information related to the management and administration of Individual Indian Trust ('IIM Trust') assets.” Opposition at 2. However, as the settlement documents make clear, Defendants are seeking clarification with respect to much more limited contacts. As explained in the Motion, Defendants merely seek clarification that certain types of limited and incidental communications between QIS, the Tribe’s enterprise, and the Eight Individuals would not be contrary to this Court’s December Order. The narrow scope and limited nature of the contemplated communications are logically tied only to the implementation of the OHTA Contract, and the settlement documents expressly provide specific limits on the permissible subject matter of the OHTA Contract and the manner in which QIS may carry out the OHTA Contract. See Motion at 2-3. Moreover, as explained in the Motion, potential contacts with the Eight Individuals would be carried out by only one specific contractor, the Tribe’s enterprise, QIS, and would not, as Plaintiffs suggest, involve Defendants, their counsel, their agents, or other contractors. See Opposition at 6.

Plaintiffs fail to show any reasonable likelihood that the limited contacts contemplated to carry out the settlement would “expose individual Indian trust beneficiaries to further deception, exploitation, and additional irreparable harm.” Id. at 7. This is because neither QIS’s contemplated limited contacts with the Eight Individuals nor the information contained in the Quapaw Analysis concerning the Eight Individuals’ non-monetary trust asset management histories will legally bind the Eight Individuals in any way. The individuals are more likely to suffer harm if the settlement fails because Defendants’ Motion is denied.

Plaintiffs further fail to substantiate their sweeping concern that QIS and its employees, agents, and subcontractors lack the professional capability to handle trust data. See Opposition at 2. Plaintiffs overlook that the OHTA Contract expressly provides specific safeguards to protect the security of the documents. See, e.g., OHTA Contract at 12, ¶¶ C.1 g. (3)(a) & (d); H.2 (attached to Defendants' Motion as Exhibit A to Exhibit 1). Moreover, both the Settlement Agreement and the OHTA Contract expressly prohibit QIS from addressing any IIM account issues in the Quapaw Analysis. See Motion at 2-3, ¶ 6 (quoting Settlement Agreement, Art. 1, ¶ 1) (“The component of the Quapaw Analysis addressing Interior’s management of certain non-monetary trust assets of the Eight Individuals shall not include an analysis of Interior’s management of the Individual Indian Money (“IIM”) accounts of either the Eight Individuals or of any other individual member of an Indian tribe.”); OHTA Contract at 8, ¶ C.1 c.

Contrary to Plaintiffs’ baseless accusations, Defendants are not seeking clarification of the December Order in order to conduct the far-ranging communications that Plaintiffs postulate. Rather, Defendants are seeking narrow relief: clarification of the December Order with respect to limited contacts that would occur only between the Tribe’s enterprise and eight of the Tribe’s members, and that would not involve IIM accounts. Plaintiffs’ objections as to the nature, scope, and effect of the contemplated communications are meritless.

D. Plaintiffs Should Not Be Permitted To Use This Court's December Order To Frustrate Settlement Efforts In Other Cases.

The Tribe and the United States expended significant efforts and resources over an extended period of time to achieve a mutually agreeable resolution to their dispute. Plaintiffs should not be permitted to jeopardize the settlement now by making baseless charges regarding

the limited communications contemplated between the Tribe's enterprise and the Eight Individuals. As noted above, Plaintiffs' counsel was kept informed of the settlement and knew and approved of the Tribe's desire to address Interior's management of the non-monetary trust assets of its individual members in settlement discussions. If Plaintiffs had objections to the Tribe including the non-monetary assets of its members as an element in the settlement, they should have voiced those objections long ago, not after a settlement has been reached and is ready for implementation. The objections Plaintiffs assert in their Opposition are exaggerated, non-specific, and nonsensical. Plaintiffs should not be permitted to use this Court's December Order to frustrate settlement efforts in other cases. This Court should reject Plaintiffs' tactics and grant Defendants' Motion, so that the Settlement Agreement, which represents a positive resolution reached through significant efforts expended by the Tribe and the United States, may be implemented.

CONCLUSION

For the foregoing reasons, as well as those stated in Defendants' Motion, Defendants respectfully move this Court, on an expedited basis, for clarification that implementation of the Settlement Agreement would not violate the December Order. In the alternative, if this Court determines that implementation of the Settlement Agreement would violate the December Order, Defendants request that the December Order be modified to permit the Tribe and Interior to carry out their Settlement Agreement.

Dated: August 19, 2004

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on August 19, 2004 the foregoing *Defendants' Reply in Support of Motion for Expedited Clarification Or, in the Alternative, Modification of the December 23, 2002 Order* 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

EXHIBIT “A”

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April 10, 2002

CONFIDENTIAL AND PRIVILEGED

Tamara Summerfield, Chairperson
Quapaw Tribe of Oklahoma
Post Office Box 765
Quapaw, OK 74363

Re: Damages Claims of Individual Tribal Members

Dear Chairperson Summerfield:

I write in response to your inquiry as to whether it would be appropriate for the Quapaw Tribe of Oklahoma to discuss with the United States the possibility of resolving damages claims arising out of the government's mismanagement of trust land and resources belonging to individual members of the Quapaw Tribe. My understanding through discussions with both John Berrey and your counsel Jason B. Aamodi, is that the Quapaw Tribe is in the process of discussing the potential resolution of its own tribal mismanagement or damages claims against the United States, and as part of those discussions would like to determine if it is possible to discuss resolution of individual damages claims as well. Specifically, as I understand it, your concern is whether any such settlement effort would conflict with plaintiffs' efforts in the *Cobell v. Norton*, Civ. No. 96-1285 (D.D.C.) matter.

To answer this question, I think it is helpful first to describe the principal objectives of the *Cobell* lawsuit. *Cobell* has three goals: (1) to ensure that the United States government and its trustee-delegates – the Interior Secretary and Treasury Secretary – create an effective trust management system for individual Indian trust beneficiaries that complies with the requirements of the Law of Trusts; (2) to obtain for all individual Indian trust beneficiaries a full and fair accounting of all trust assets, including without limitation, all deposits, accruals and withdrawals from the inception of the trust to present; and (3) to correct and restate the trust account balances of all past and present individual Indian trust beneficiaries so that they are accurate.

What is notable for purposes here is that unlike your tribe's trust, the Individual Indian Trust is a commingled trust. This means that the trust revenue of each individual Indian trust beneficiary – regardless of tribe – is invested in common and managed as pooled monies. Interest and other forms of investment income is earned by the common trust fund and must be allocated and

Letter to Tamara Summerfield

April 10, 2002

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distributed in accordance with the individual's beneficial interest. Therefore, members of your tribe who are trust beneficiaries have their funds invested in common with the individual Indian trust beneficiaries of all other tribes. No such individual Indian trust funds should be invested in common with tribal trust funds, including such funds beneficially owned by the Quapaw Tribe.

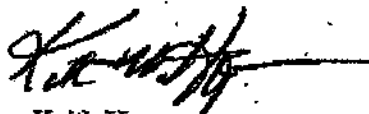
Cobell is an action in equity; it seeks to enforce the money management component of the trust obligation owed by the United States to all individual Indian trust beneficiaries—regardless of their tribal enrollment—because of the unique status of the Individual Indian Trust as a common trust fund. *Cobell* does not seek damages for losses sustained by the government's mismanagement of an individual Indian trust beneficiary's land caused by the mismanagement.

To the extent that the Quapaw Tribe wants to discuss with the United States the possibility of resolving its members' damages claims for losses sustained as a result of the government's mismanagement of individual Indian trust lands and other natural resources (e.g., lead and zinc), such claims are not now within the scope of the *Cobell* action. Therefore, discussions between your tribe and the government on such issues would not be in conflict with *Cobell* and would be appropriate for the Quapaw Tribe to resolve independently with the government.

We would of course like to continue to work with you, John and Jason and be informed of any developments or difficulties in your discussions with the government. And, we believe that it would be important to maintain confidentiality of any such discussions so that government officials do not utilize any negotiations in their persistent and continuing disinformation campaign to undermine *Cobell*.

I hope this satisfies your inquiry. If not, please feel free to contact me at your convenience. And I wish you and the Quapaw Tribe well in your proposed discussions with the United States.

Best regards,



Keith Harper

cc: Dennis Gingold
John Echohawk
John Berrey
Jason Aamodt