

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, <u>et al.</u> ,)	
)	
Plaintiffs,)	No. 1:96CV01285
v.)	(Judge Lamberth)
)	
GALE A. NORTON, Secretary of)	
the Interior, <u>et al.</u> ,)	
)	
Defendants.)	

**DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR
RECONSIDERATION OF THE COURT'S MAY 28, 2004
ORDER REGARDING HISTORICAL STATEMENTS OF ACCOUNT**

Plaintiffs' Motion For Reconsideration Of The Court's May 28, 2004 Order Regarding Historical Statements Of Account ("Plaintiffs' Motion for Reconsideration"), filed August 27, 2004, seeks an order prohibiting the Department of the Interior ("Interior") from providing completed historical statements of account to Individual Indian Money ("IIM") account holders.¹ Inasmuch as Plaintiffs offer no reasonable justification for withholding completed historical statements of account from IIM account holders, Plaintiffs' Motion for Reconsideration should be denied.

BACKGROUND

In its Order of May 28, 2004, the Court ruled that Defendants are permitted to send historical statements of account to IIM account holders, provided such statements are accompanied by a transmittal letter that includes text prescribed by the Court and provided that Defendants first submit to the Court "(1) a sample of the actual letter to be mailed with the

^{1/} If the account holder is a minor, regulations provide that information about the account is to be provided to the parent or legal guardian. 25 C.F.R. § 115.403.

[prescribed] language inserted; (2) a sample of one of the historical statements of account; and (3) the exact number of historical statements of account and transmittal letters [Defendants] plan to send out."² Order of May 28, 2004, at 4. In their First Submission In Compliance With May 28, 2004 Memorandum And Order Regarding Historical Statements Of Account ("Defendants' First Submission"), filed June 22, 2004, Defendants submitted the requisite sample documents to the Court for approval, and informed the Court that Defendants planned to send 17,096 historical statements of account. In accordance with the Court's Order, the transmittal letter to be mailed to each IIM account holders with the historical statement of account contains the following text:

Cobell v. Norton Litigation: Please be aware that the account holder for whom this historical statement of account was prepared may be a member of a class action lawsuit, Cobell v. Norton, No. 1:96CV01285 (D.D.C.) (Judge Lamberth). Nothing in this notice should be interpreted as eliminating any rights that the account holder may have if they are a class member in this litigation. If the account holder is a class member and fails to challenge this historical statement of account they do not lose any rights that they have as a class member. For further information you may contact the lawyers for the class members: Dennis M. Gingold, Esq., 607 14th Street, N.W., 9th Floor, Washington, DC 20005, phone: (202) 824-1448, fax: (202) 318-2372, email: dennismgingold@aol.com, or Keith Harper, Esq., Native American Rights Fund, 1712 N Street, N.W., Washington, DC 20036-2976, phone: (202) 785-4166, fax: (202) 822-0068, email: harper@narf.org. You may also access further information at the plaintiffs' website, www.indiantrust.com.

² The Court also required Defendants to submit for approval a supplemental notice with prescribed text to be sent to the 1,208 IIM account holders who have already received historical statements of account. Defendants' Second Submission In Compliance With May 28, 2004 Memorandum And Order Regarding Historical Statements Of Account, filed August 18, 2004, provided the supplemental notice to the Court.

Plaintiffs now seek reconsideration of the Court's May 28, 2004 Order, three months after its entry, and ask the Court to prohibit Interior from providing completed historical statements of account to IIM account holders.

ARGUMENT

Plaintiffs have failed to direct the Court to any relevant change in law since May 28, 2004, proffer any new evidence, or demonstrate that reconsideration of the Court's May 28, 2004 Order is necessary to correct a clear error or manifest injustice. See Cobell v. Norton, 226 F. Supp. 2d 175, 177 (D.D.C. 2002) ("The court may invoke its discretion and deny [a motion for reconsideration] unless it finds an intervening change in controlling law, the availability of new evidence, or the need to correct clear error or manifest injustice."). Indeed, Plaintiffs have offered no reasonable justification for withholding completed historical statements of account from IIM account holders. Their Motion for Reconsideration should be denied.

To the extent that any coherent argument can be discerned in the stream of invective and baseless accusations of misconduct in Plaintiffs' motion,³ they appear to contend yet again that the Court should prevent IIM account holders from receiving historical statements of account because Plaintiffs' counsel believe the statements are "false" and "misleading" and "interfere" with the rights of class members in this litigation. E.g., Pls.' Mot. for

^{3/} Defendants deny each and every allegation of misconduct in Plaintiffs' Motion for Reconsideration. In addition, Defendants have filed a motion to strike Plaintiffs' motion for reconsideration in its entirety because of its abusive and scandalous content. See Defendants' Motion To Strike Plaintiffs' Motion For Reconsideration Of The Court's May 28, 2004 Order Regarding Historical Statements Of Account And To Admonish Plaintiffs' Counsel To Comply With The D.C. Bar's Voluntary Standards For Civility In Professional Conduct (Dkt. No. 2647) (filed Sept. 10, 2004).

Reconsideration at 1 ("The goal of these deceptive communications is to sow confusion and thereby interfere with their rights of [sic] beneficiaries as members of the plaintiff class."); id. at 2 ("[Interior] seeks to transmit over 25,000 'historical statements of account' . . . to individual Indian trust beneficiaries each of which is false, misleading and designed to interfere with the rights of the members of the plaintiff class."). Plaintiffs apparently continue to believe that IIM account holders – alone among the participants in this litigation – should be denied access to information regarding their IIM accounts.

Plaintiffs' motion is full of contentions that the historical statements of account are inadequate to fulfill Defendants' accounting obligations under the American Indian Trust Fund Management Reform Act of 1994, Pub. L. No. 103-412, 108 Stat. 4239 ("1994 Act"), but that question is not before the Court at this time.⁴ Rather, as Plaintiffs concede late in their brief, the question before the Court is "whether the draft statements of account 'present[] a significant risk of serious interference with the rights of the class members.'" Pls.' Mot. for Reconsideration at 21-22 (quoting Cobell v. Norton, 212 F.R.D. 14, 19 (D.D.C. 2002)).

If it was not otherwise clear that the statements of account that Interior is seeking to provide to account holders do not interfere with the rights of class members in this litigation, the language prescribed by the Court in its May 28, 2004 Order, which is included verbatim in

⁴ Indeed, in light of the pending appeal of the structural injunction entered after the Phase 1.5 proceeding, it would be improper for the Court to assess Defendants' compliance with the 1994 Act at this time. Moreover, even if this issue were properly before the Court, it would be difficult to imagine a legitimate justification for denying the account holders an opportunity to review their historical statements of account and provide input as to what arguments, if any, should be made in any proceeding in which the adequacy of the statements is at issue. In any event, Defendants dispute all of Plaintiffs' allegations regarding the adequacy of their accounting efforts.

both the transmittal letter (Attachment 1 to Defendants' First Submission) and the brochure (Attachment 2 to Defendants' First Submission) that will accompany each historical statement of account, leaves no doubt. That language (quoted in full on page 2, supra) states that the account holder may be a member of this class, that "[n]othing in this notice should be interpreted as eliminating any rights that the account holder may have if they are a class member in [this] litigation," that "[i]f the account holder is a class member and fails to challenge this historical statement of account they do not lose any rights that they have as a class member," and that the account holder may contact class counsel for further information. It includes the names, addresses, phone numbers, and email addresses of plaintiffs' counsel, as well as the address of Plaintiffs' website. Accordingly, the historical statements of account and accompanying materials could not possibly be construed to interfere with the rights of class members in this litigation. Plaintiffs' reckless allegations that Defendants are somehow attempting to "exploit[] and interfer[e] with the rights of the *Cobell* class, including Indian children," Pls.' Mot. for Reconsideration at 5, "rob the individual Indian trust beneficiaries of their vested property rights," id. at 6, or "dupe this Court," id., are absurd and demonstrably false.⁵

Nor are the historical statements of account or accompanying materials "false" or "misleading" in any sense. As the sample documents attached to Defendants' First Submission demonstrate, each historical statement of account clearly identifies the beginning balance of the

⁵ Plaintiffs appear to argue that an agency superintendent who is the legal guardian of an account holder will ignore the best interests of the account holder because he or she is employed by Interior. Plaintiffs have presented no evidence whatsoever to support such an accusation, and it therefore should be summarily rejected.

IIM account, and all receipts, interest and other activity in the account from the opening deposit through December 31, 2000. The transmittal letter explains the source and amount of the judgment award credited to the account. See Sample Transmittal Letter at 1 (Attachment 1 to Defendants' First Submission). The letter explains that the balance shown on the statement as of December 31, 2000, agrees with the balance maintained by Interior's Office of Trust Funds Management ("OTFM"), and notes that information about account activity and balances after that date may be found in the statements of account sent quarterly by OTFM. Id. The letter explains that "[i]n performing the accounting, the [Office of Historical Trust Accounting ("OHTA")] reviewed documents verifying the award, the approved tribal resolution distributing the award to tribal members, and the plan governing the use and distribution of the award." Id. at 2. It further states that OHTA "verified the monthly interest based on the interest rate distribution factor determined by OTFM" and that "[a]n independent accounting firm reviewed the historical accounting work to ensure correctness." Id. The transmittal letter urges the account holder to compare the historical statement of account to his or her files and records, and invites the account holder to provide any information indicating the statement is incorrect to OHTA. Id.

Also included in the documents to be transmitted to account holders is a "Statement of Accounting Limitations." This statement explains that IIM funds have, by statute and policy, typically been invested in securities issued by the United States Treasury and United States government sponsored entities, and describes the range of investment maturities. Statement of Accounting Limitations at 1 (Attachment 4 to Defendants' First Transmission). The statement further explains how OTFM determines the monthly interest factor used to credit interest to

each IIM account, and encloses a table containing a comparative summary of OTFM interest factors and investment pools similar to the IIM Trust Fund. Id. In addition, the statement discloses that Interior has identified potential discrepancies that may affect invested funds accruing interest, and explains that, while Interior believes the discrepancies are minimal, they may have a small impact on the amount of interest credited to an account. Id. The statement explains that when this issue is resolved as the historical accounting project progresses, Interior will request an appropriation from Congress to address the issue, and the account holder's IIM account may be credited with additional interest. Id. Finally, the statement advises that Interior has determined that the initial deposit into the IIM account was correct, that no improper disbursements were made from the account through December 31, 2000, and that the interest calculated by OTFM, based on the monthly interest distribution factor, was properly applied to the account. Id. It states that, as the historical accounting project progresses, Interior will confirm the amount of interest the account holder is entitled to receive, and will explain to the account holder how any such interest was determined. Id.

A brochure entitled "Information On Historical Accounting of Judgment and Per Capita IIM Accounts" (Attachment 3 to Defendants' First Submission) will also accompany each historical statement of account. The brochure contains additional explanatory information about the historical statement of account, and, like the transmittal letter, contains the verbatim language about this litigation required by the Court.

Thus, the historical statements of account and accompanying material Interior seeks to send to the IIM account holders are neither "false" nor "misleading." The accompanying materials explain in a straightforward manner the accounting work Interior performed to

prepare the statement, including the method utilized to verify interest postings, and invite the account holder to bring any errors to the attention of OHTA.

Plaintiffs offer no reasonable justification for withholding this information from the account holders. In accordance with the Court's November 1, 2002 Order permitting Interior "to provide [p]laintiffs' counsel with a copy of any historical statements of account provided to any Individual Indian Money account holder," Order of Nov. 1, 2002, at 1, Plaintiffs' counsel will receive copies of all historical statement of account provided to IIM account holders, and are free to contact the recipients who are class members with whatever additional information they may wish to provide. The Court should reject Plaintiffs' attempt to prevent IIM account holders from receiving information to which they are entitled.

CONCLUSION

For these reasons, Plaintiffs' Motion for Reconsideration should be denied, and the Court should permit Interior to provide the historical statements of account and accompanying materials described in Defendants' First Submission to IIM account holders.

Dated: September 10, 2004

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on September 10, 2004 the foregoing *Defendants' Opposition to Plaintiffs' Motion for Reconsideration of the Court's May 28, 2004 Order Regarding Historical Statements of Account* was served by Electronic Case Filing, and on the following who is not registered for Electronic Case Filing, by facsimile:

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)	
Defendants.)	
_____)	

ORDER

This matter comes before the Court on *Plaintiffs' Motion for Reconsideration of the Court's May 28, 2004 Order Regarding Historical Statements of Account*, Dkt # 2647. Upon consideration of Plaintiffs' Motion, Defendants' Opposition, any Reply thereto, the applicable law and the entire record of this case, it is hereby

ORDERED that the Motion is DENIED.

SO ORDERED this _____ day of _____, 2004.

Hon. Royce C. Lamberth
UNITED STATES DISTRICT JUDGE
United States District Court for the
District of Columbia

cc:

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