IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

INTERIOR DEFENDANTS' SUPPLEMENTAL OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION REGARDING HISTORICAL STATEMENTS OF ACCOUNT

Pursuant to the November 1, 2002 Order of the Court, the Secretary of the Interior and the Assistant Secretary - Indian Affairs ("Interior Defendants," or "Interior") respectfully submit the following supplemental opposition to Plaintiffs' Motion for a Preliminary Injunction ("Preliminary Injunction Motion"). The Preliminary Injunction Motion should be denied.

INTRODUCTION

Interior has prepared historical statements of account for certain Individual Indian Money ("IIM") judgment account holders, and Interior believes that it is obligated to send them to the account holders as part of Interior's trust responsibility. On September 20, 2002, Plaintiffs filed the Preliminary Injunction Motion to prevent the statements from being sent to the IIM account holders. Interior filed an opposition to the Preliminary Injunction Motion on September 23, 2002. On October 9, 2002 and October 28, 2002, Interior mailed a total of approximately 1,200 historical statements of account to the parent or guardian of the account holder for whom they were prepared.

On November 1, 2002 the Court heard arguments on the Preliminary Injunction Motion.[1] The Court indicated at the hearing that it is not troubled by the transmission of the statements themselves. November 1, 2002 Transcript ("Tr.") at 16, 19, 33, 34. The Court expressed concern, however, about the information accompanying the statements which informed the account holders that Interior had an administrative process in place to handle questions about the statements and that under this process any challenges to the historical statements of account must be made within 60 days or the opportunity to appeal would be lost. Id. at 16, 33. At the hearing, the Court directed the parties to file supplemental briefing regarding the propriety of Interior's communication with class members when it mailed the historical statements of account. As discussed below, Interior's communication was appropriate and may have been required.

I. INTERIOR'S COMMUNICATION WITH CLASS MEMBERS IN SENDING THE HISTORICAL STATEMENTS OF ACCOUNT WAS APPROPRIATE

The defendants in this case have an ongoing relationship with class members due to Interior's trust responsibilities to the IIM account holders and as part of Interior's numerous other statutory responsibilities. A necessary part of that relationship involves communication with class members.

Interior has not violated any order of the Court prohibiting communication with class members, and the Court has indicated that ordinary course of business communications, including even the historical statements of account themselves, are not prohibited. Tr. at 16, 19, 34. The Court has expressed concern about the information in the transmittal letter informing the

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[1] The Court also heard argument on Interior's Motion for an Order Permitting Interior to Send the Statements to Plaintiffs' Counsel and on Plaintiffs' Motion for a Temporary Restraining Order. By Order of November 1, 2002 the Court granted Interior's Motion and denied, as moot, Plaintiffs' TRO Motion.

account holders of the existing administrative process that governs challenges they may have to the historical statements of account. But that information was not false or misleading. Indeed, to omit such information while transmitting the statements could have been misleading because the recipient may not have known about the Interior administrative process. Interior's communication was thus proper, and may have been necessary.

A. No Prior Restraint on Communication Was In Place

The Court has the authority under Fed. R. Civ. P. 23 to enter an order restricting communication with class members, but only after a hearing to develop a record establishing why such an order is needed to protect the class from undue interference and false or misleading statements. See Gulf Oil Co. v. Bernard, 452 U.S. 89 (1981).[2] This Court has not issued such an order. By Order of February 4, 1997, the Court certified the class, but did not prohibit communication in that order and has not prohibited communication in any subsequent order or required that any communication be approved first by the Court.[3] In addition, no local rule,

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[2] Courts routinely refuse to impose limitations on communications unless based on a clear record showing the need. See, e.g., Williams v. Chartwell Fin. Servs., Ltd., 204 F.3d 748, 759 (7th Cir. 2000); Great Rivers Coop. v. Farmland Indus., 59 F.3d 764, 766 (8th Cir. 1995).

[3] Interior, and Interior's counsel, have previously requested Court approval of certain proposed communications with class members. See Interior's Emergency Motion For Entry of An Order Clarifying Ethical Obligations of Attorneys Regarding Public Administrative Process, filed December 11, 2001 ("December 11 Motion"); and Interior's Motion For Entry of An Order Regarding A Public Administrative Process To Implement The American Indian Trust Fund Management Reform Act of 1994, filed March 1, 2000 ("March 1 Motion"). Those prior motions made clear that Interior did not believe prior approval of the Court was necessary, but was only sought in the circumstances of those proposed communications out of "an abundance of caution." December 11 Motion at 3; March 1 Motion at 3. Moreover, the communications involved in those motions were different from the communication involved here where Interior believes it is required to transmit the historical statements of account to the account holders for whom they were prepared. The focus of the earlier motions was on the appropriateness of attorney participation in the proposed communications. In the Order of December 12, 2001,

statute or other regulation imposes a blanket prohibition on communication between Interior and the class member account holders.

Indeed, where a class action defendant has an ongoing business relationship with class members, as is the case here, ordinary course of business communications, unrelated to the litigation, are clearly not prohibited. See, e.g., Great Rivers Coop., 59 F.3d at 766; Rankin v. Board of Educ., 174 F.R.D. 695, 697 (D. Kan. 1997); Resnick v. American Dental Ass'n, 95 F.R.D. 372, 377 (N.D. Ill. 1982); see generally Manual for Complex Litigation (Third), §30.24, at 234 (1995); Newberg on Class Actions, §15.14 (3d ed. 1992). The unique difficulty in this case is that given the nature of Plaintiffs' claims related to accountings and general trust reform, coupled with the wide scope of Interior's statutorily mandated responsibilities to class members, virtually any communication could be described as "related to the litigation."

In a similar context, a district court in New Mexico recognized that Interior's status as a government entity, with responsibilities to serve class members, distinguished it from the usual situation regarding contact with class members. Ramah Navajo Chapter v. Babbitt, No. Civ. 90-0957, Mem. Op. at 5 (D.N.M. filed Aug. 3, 1999) ("[I]t is clear that the Assistant Secretary's unique role and his relationship with the tribal entities which make up the class are sufficient to distinguish the authority the Class cites") (opinion attached as Exhibit 1). Absent the ability to communicate with class members without prior approval of the Court, Interior would simply be unable to perform its statutory duties.

Indeed, perhaps recognizing the nature of the relationship between class members and

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granting the December 11 Motion, the Court did impose conditional restrictions on the participation of certain identified attorneys in the proposed communication.

Interior, the Court has indicated that the provision of quarterly statements of account and even the historical statements of account at issue here are not improper communications. Tr. at 16, 33. So the only issue remaining for resolution by the Court is whether there was anything in the transmittal letters accompanying the historical statements of account, and informing the recipients about Interior's administrative procedures for resolving disputes about the historical statements of account, that was somehow improper or otherwise required prior approval of the Court.[4] Interior believes that the communication was appropriate.

B. Communication Regarding Administrative Procedure Was Not False Or Misleading

A primary concern regarding communication with class members is that the communication should not be false or misleading. The Supreme Court recognized that "[u]napproved communications to class members that misrepresent the status or effect of the pending action also have an obvious potential for confusion and/or adversely affecting the administration of justice." Gulf Oil, 452 U.S. at 101 n.12. Courts are concerned about defendants soliciting class members to opt-out of the class based on false and misleading statements. See, e.g., Kleiner v. First Nat'l Bank, 751 F.2d 1193 (11th Cir. 1985); Jennifer v. Delaware Solid Waste Auth., No. 98-220, 1999 WL 117762, at **3-5 (D. Del. Feb. 25, 1999). In Faucett v. American Telephone & Telegraph Co., No. 81-1804, 1985 WL 25746 (D.D.C. Oct.

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[4] It should be noted that communications with account holders whose accounts were created after February 4, 1997, when the class was certified for "present and former beneficiaries of Individual Indian Money accounts," Certification Order at 2-3, are obviously not communications with class members unless these account holders also had other IIM accounts created before February 4, 1997. All of the historical statements of accounts sent thus far were sent to account holders whose judgment accounts were created after February 4, 1997, but Interior has not yet verified whether these account holders also had other accounts created before February 4, 1997.

18, 1985), the court found that statements provided to class members materially misrepresented plaintiff's claims and, therefore, could be enjoined.

Here, no one can claim that the information provided in the transmittal letters about the administrative procedure adopted by Interior for application to disputes about the historical statements of account is false or misleading. The information in the transmittal letters accurately describes the nature of the administrative process that is in place.

Plaintiffs, before they had even seen the historical statements of account, charged that they were false or misleading. But, again, the issue for decision here is not whether the statements themselves might contain inaccurate information. Indeed, the whole point of the administrative procedure is to obtain information the recipient may have about any inaccuracies and hopefully resolve any dispute before it goes to the Court. So the focus must be on whether the information about the administrative procedure supplied to the account holder is untruthful or misleading.

Much of the administrative process applicable to the historical statements of account was already in place to handle appeals from other types of decisions by Bureau of Indian Affairs ("BIA") officials. See generally 43 C.F.R., Part 4. The Federal Register Notice of September 6, 2002, merely gave notice that the procedures already in place would apply to OHTA decisions. See Notice of Review of Historical Trust Accounting, 67 Fed. Reg. 57,122 (September 6, 2002) (attached as Exhibit 1 to Plaintiffs' Reply to Interior's Opposition to Plaintiffs' TRO Motion).[5]

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[5] The Federal Register notice and the regulations published in the C.F.R. may not have described all aspects of the administrative procedure governing these historical statements of account. However, the applicable process was adopted by the agency before the statements went out. The communication to the account holders merely advised them of an existing agency procedure and gave appropriate warning of the possible consequences of inaction.

No one has suggested that Interior lacks authority to set up an administrative procedure for review of accounting appeals and to require exhaustion of administrative remedies.[6] The Court's expressed concern seemed to be only about how Interior communicates information about the administrative procedure to class members.[7]

C. Silence About The Administrative Procedure Could Have Been Misleading

If it was proper for Interior to mail out the historical statements of account – and the Court has indicated that it was – and if the administrative procedure itself is not at issue, then not only was it permissible for Interior to inform the account holders about the procedure, but Interior may have been required to give them the information when Interior sent out the statements. Omitting a description of the administrative procedure adopted by Interior could

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[6] Any challenge to the administrative procedure itself – as opposed to communications with class members about the procedure – is not properly before the Court. The issue is not the subject of the Preliminary Injunction Motion, which is limited to Plaintiffs' attempt to prohibit transmittal of the statements to account holders. Plaintiffs have not amended, or sought to amend, their complaint to add an attack on Interior's administrative powers. And, most importantly, the issue is not ripe yet for the Court to hear. No account holder has yet had any purported rights extinguished by the 60-day rule or any other aspect of the administrative procedure. If that happens, then and only then, would the issue be ripe for the Court to hear. Interior, of course, does not concede that a challenge would then be appropriate or that the Court would have jurisdiction to challenge the routine administrative process adopted by Interior. Interior only acknowledges that it would then be ripe for review.

[7] The Court also expressed some concern about the ethical obligations of attorneys in regard to communications by their client with class members. Tr. at 7. Interior is unaware of any ethical rule that requires counsel to instruct a client to restrict its communications where the proposed communications themselves are not improper. As described in the text, the communications here were entirely appropriate. D.C. Rule of Prof. Conduct 4.2(a) obviously prohibits direct, or indirect, communication between counsel and a represented party, but as described previously, provision of the historical statements of account was a communication by Interior to the account holders and was not a communication initiated by, or on behalf of, counsel. Counsel gave advice to ensure compliance with this Court's orders, but such advice does not violate Rule 4.2 or any other applicable rule of professional conduct.

have misled the recipient into believing that the process did not apply to the historical statements of account. The account holder might not have realized that inaction would have precluded a challenge to the statements. Under these circumstances, Interior properly decided to include notice of the administrative procedure in the transmittal letter.

II. INTERIOR IS WILLING TO ADD LANGUAGE NOTIFYING ACCOUNT HOLDERS OF THE CLASS ACTION IF DESIRED BY THE COURT

Interior believes that its communication with the account holders regarding the historical statements of account and the applicable administrative process was appropriate. It is not aware of any requirement that such a communication include notice of this case, but is willing to add such a notice to future statements and to provide it to the account holders who have already received statements, if such notice is desired by the Court.

A. No Requirement That Class Members Be Notified Of The Pendency Of A Class Action

As discussed above, nothing in the language informing the account holders of their administrative rights and obligations regarding the historical statements of account was untruthful or misleading. The historical statements of account and the accompanying transmittal letter did not mention this action or the existence of class counsel. Interior does not believe, however, that anything in the Court's prior orders, statutory authority or other law required Interior to notify the account holders of this case or to inform them that they were members of a class, represented by class counsel.

In fact, it may have been misleading to include language about the case in the historical statements of account. In Rankin, 174 F.R.D. 695, the plaintiff class was composed of students receiving speech and language services. Defendant school district sent notices to the parents

acknowledging a claim contained in the complaint that certain services had not been provided and stating that compensatory services would be provided. The letter did not mention the class action. The court found that the letter, even if it discussed matters that were the subject of the litigation, was not an abusive practice. The letter did not reference the litigation and did not "attempt to seek to discourage or prevent the recipients of the letter from participating in the lawsuit." Id. at 697. The court recognized that it would "be difficult, if not impossible, for the defendants to continue to provide services if all communications had to be made through counsel." Id. Moreover, the court prohibited the defendant from making any "contact or communication with [potential class members] which expressly refers to this litigation." Id. The court permitted ordinary course of business communications, "even though such communications may necessarily implicate the subject matter of the litigation." Id.

Similarly, here, if Interior had included a reference to this case in the historical statements of account or in any way had attempted to describe the nature of the claims in this case, it might have misled the recipient. Interior did not "attempt to seek to discourage or prevent the recipients of the letter from participating in the lawsuit." Rankin, 174 F.R.D. at 697. Omitting notification of this case was not improper under the circumstances of this case.

B. If Desired, Notification Language Can Be Added

The current form of the historical statements of account and the accompanying transmittal letter is appropriate. To allay any concerns by the Court, however, Interior is willing to add a notification about the case in the transmittal letters to class members and send out a similar notice to any class member who has already received a statement, along with notice that the 60-day period for challenging the statement does not begin to run until the date the supplemental

notice is sent.[8] Interior is even willing to use a larger, bolded typeface to convey such a notification.

Plaintiffs' counsel may not want such a notice to be included, especially since after entry of the Court's November 1, 2002 order, Interior is now authorized to send them copies of the historical statements of account. Plaintiffs' counsel have already received copies of the statements that have gone out and will get copies of the future statements, and counsel can communicate with these class members as desired. However, if the Court considers it appropriate, Interior will send an amended notice to prior class member recipients of historical statements of account and will include the language in future transmittals to class members.

CONCLUSION

For these reasons, and for the reasons discussed in Interior's Opposition to the TRO Motion filed on September 23, 2002, Plaintiffs' Preliminary Injunction Motion should be denied.

Dated: November 15, 2002

Respectfully submitted,

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[8] The notice can read: **The account holder is a member of a class action, Cobell v. Norton, No. 1:96CV01285, (D.D.C.). Class members are represented by counsel who can be contacted at [address/phone number/web address].**

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CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on November 15, 2002 I served the foregoing *Interior Defendants' Supplemental Opposition to Plaintiffs' Motion for a Preliminary Injunction Regarding Historical Statements of Account* by facsimile in accordance with their written request of October 31, 2001 upon:

Keith Harper, Esq.
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By U.S. Mail upon:

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By facsimile and U.S. Mail upon:

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K.P. Kingston

Kevin P. Kingston

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

RAMAH NAVAJO CHAPTER, and other similarly situated entities,

Plaintiffs,

vs.

No. CIV 90-0957 LH/WWD

BRUCE BABBITT, Secretary of the Interior, EDDIE BROWN, Assistant Secretary of the Interior; MARVIN PIERCE, Chief of the Office of Inspector General, U.S. Department of the Interior; and THE UNITED STATES OF AMERICA,

Defendants

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court on the Plaintiffs' Motion to Show Cause and For an Injunction to Control Defendants' Communications to the Class (Docket No. 304), filed August 3, 1999. The Court, having considered the pleadings submitted by the parties, the arguments of counsel, and otherwise being fully advised, finds that the motion is not well taken and will be denied.

INTRODUCTION

Plaintiff Class seeks a preliminary injunction and contempt sanctions against Defendant Kevin Gover, the Assistant Secretary of the Interior for Indian Affairs, and the Defendant United States Department of the Interior in response to what the Class characterizes as "improper and misleading communications with members of the Class and other breaches of contract and fiduciary duties in

Exhibit 1

violation of specific covenants in the Partial Settlement Agreement of August 31, 1998 . . . " (*See* Mot. Show Cause at 1.) Specifically the Class complains that the Defendant Department and Defendant Gover sent a "Tribal Consultation Letter" to all tribal leaders, including leaders of all of the members of the Class. This consultation letter addressed issues fundamental to this lawsuit and the Partial Settlement Agreement (PSA), including the means by which the Government should reimburse tribes for their indirect costs incurred under their Self-Determination Act contracts and the so-called Judgment Fund issue. Plaintiff Class contends that this violates Rule 23 of the Federal Rules of Civil Procedure, this Court's Order which incorporated the PSA, and "the Assistant Secretary's duties as a contractor and a trustee of the Class." (*See* Mot. Show Cause ¶ 16.)

The Plaintiff Class seeks extraordinary relief from this Court. The motion seeks to prevent Assistant Secretary of Indian Affairs Kevin Gover from communicating with the Class and from giving certain testimony before and making particular recommendations to the Congress of the United States. The Class's request is not extraordinary merely because of the remedies sought, but because of whom the Class seeks to silence. The Class fails to fully recognize the unique status and responsibilities of the Defendants and seeks relief which would undermine the careful balance and separation of powers enumerated in the Constitution. This Court cannot—and will not—usurp the powers of the Judicial Department's co-equal branches. The motion of the Plaintiff Class will be denied.

COMMUNICATIONS WITH CLASS AND MOTION TO SHOW CAUSE

In their motion the Class seeks an order to show cause directing the Assistant Secretary to demonstrate why he should not be held in contempt for violating the Court's Order adopting the PSA and for communicating with members of the Class without the consent of their counsel. (*See* Mot.

Show Cause at 9.) Plaintiffs seek an injunction barring further communication with the Class and a directive to the Defendants to carry out their responsibilities under the PSA. In their memorandum in support of the motion Plaintiffs seek more specific relief, including a correction of some of the prior communications, restrictions on future communications with the class, and directing the "Defendants to correct any damage the June 23rd materials may have caused by notifying all recipients and Congress that the mailing violated the rules pertaining to class actions and the Order of the Court." (*See id.*)

After the Class filed its motion the Defendants requested and received further clarification from Class Counsel on what immediate relief the Class sought. Class Counsel sent a letter making this clarification and attaching a revised form of Order. *See* Letter from Gross to the Court of August 4, 1999. In that revised form of Order, Plaintiff Class seeks, *inter alia*, to have Defendant Gover enjoined from communicating with the Class on any issues pending in this case; prevented from further compilation or dissemination of his June 23, 1999, mailing; enjoined from forwarding his plan to Congress; and ordered to notify any Member of Congress who is in receipt of the plan that the proposal is "suspended by order of the Court." In essence, the revised proposed Order would grant immediate injunctive relief which would prevent the Executive Branch from communicating its legislative proposals and would constrain Congress from considering or enacting Mr. Gover's proposal "by order of the Court." Such an order, if issued, would fundamentally undermine the doctrine of separation of powers.

Plaintiffs justify their extraordinary, even revolutionary, request by asserting that Defendant Gover has been grossly deceptive in his communications in an effort to mislead members of the Class to gain their support for his legislative proposal. (*See* Mot. Show Cause ¶¶ 8-12.) The Class asserts

that Defendant Gover's communication violated the Federal Rules of Civil Procedure, this Court's Orders, and the Defendant's own trustee responsibilities. Specifically, the Class asserts that Defendant Gover has violated Rule 23 of the Federal Rules of Civil Procedure, paragraphs 11e and 11d of the Partial Settlement Agreement which was incorporated in the Judgment of this Court on May 14, 1999 (Docket Nos. 284, 285), and an Order entered by this Court on September 22, 1998, which is entitled "Parties' Stipulated Order Regarding Equitable Relief." Upon closer inspection, however, it is clear that the Plaintiffs' Motion is built upon a house of cards.

Plaintiffs make strong and repeated statements that Defendant Gover has violated the Federal Rules of Civil Procedure and this Court's orders and should be required to show cause why he should not be held in contempt. However, Rule 23, while granting this Court broad discretionary power over class actions creates no explicit rule against communicating with a class, either by the Defendant or its counsel. *See* FED. R. CIV. P. 23(d) (granting broad authority to impose conditions on class action litigation). Courts have used that power to impose limitations on communications, however, no such limitations have, heretofore, been imposed in this litigation. *See Gulf Oil v. Bernard* 452 U.S. 89 (1981).

Plaintiffs make much of the Defendants' agreement in the PSA to "take *actions* to support *reasonable* efforts to minimize or eliminate" the impact of the Judgment Fund issue and that they will not pay back the Judgment Fund unless required by law to do so. (*See* PSA ¶¶ 11d; 11e (emphasis added).) However, to argue that these very general policy statements, even when read in conjunction with Rule 23, "forbid . . . defendant's counsel . . . and defendants themselves from contacting class members on pending issues" is disingenuous. (*See* Mem. Supp. Mot. Show Cause at 3.) Likewise, there is simply nothing in the Parties' Stipulated Order Regarding Equitable Relief (Docket No. 199),

filed September 22, 1998, which could be construed to restrict the Defendants' communications with the Class. Plaintiffs admit as much when they note that the PSA sets out the parties differing views on the resolution of the equitable claims and "acknowledg[es] that the issue was not resolved by the PSA." (*See* Mot. Show Cause ¶ 5.) The Court cannot conclude that Defendant Gover has been specifically or even generally prohibited from contacting the Class by either of these Orders.[1] Nor can it be reasonably argued that the PSA prevents Assistant Secretary Gover from exercising his discretion in making alternative recommendations for the *political* resolution of the contract support issue which is at the heart of this litigation.

While at first blush the Plaintiffs' arguments that Defendant Gover is interfering with counsel's relationship with the Class appears to have some merit, it is clear that the Assistant Secretary's unique role and his relationship with the tribal entities which make up the class are sufficient to distinguish the authority the Class cites. (*See* Defs.' Resp. at 9-11 and Decl. Kevin Gover.) The Class's concern about these communications is not unjustified. *See e.g. Rankin v. Board of Education of the Wichita Public Schools*, 1 74 F.R.D. 695, 697 (D. Kan.1997) (noting potential abuse if defendants were permitted to directly lobby prospective members of a class). However, this litigation does not 'merely' involve the First Amendment Rights of private parties or even the authority of state or local governments. The relationship between the United States and tribal governments would be seriously compromised if the Court were to impose even limited restrictions on those government to government communications. (*See* Defs. Resp. at 10 (citing Exec. Order No. 13,084, 63 FR 27655

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[1] Obviously, had Defendants counsel engaged in this direct communication with the Class, ethical constraints might have been implicated. However, as Defendants note, Mr. Gover was acting only in his official capacity and not as an attorney when he communicated with members of the class

(1998)) Even the authority cited by the Plaintiffs acknowledges that judicial intervention is only justified "on 'a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties' [and that] this weighing should result in a carefully drawn order that limits speech as little as possible " MANUAL FOR COMPLEX LITIGATION at 233-34 (3rd ed. 1995). This Court cannot conclude that any limitation on the ability of the Executive Branch to exercise its responsibility to discuss its legislative proposals—even those contrary to the spirit of the PSA—with the tribal governments of this nation is justified or even permissible Having concluded that there is no basis to find that the Defendants have violated any rule or order of this Court nor any reason to restrict the ability of the Defendants to communicate with the Class, the Court will deny the Motion for an Order to Show Cause.

IMMEDIATE INJUNCTIVE RELIEF SOUGHT

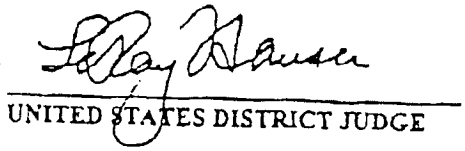
Even assuming, *arguendo*, that Defendant Gover had violated some provision against communicating with the Class, the Court would be unable to impose the injunctive relief sought by the Plaintiff Class Defendants correctly note that the Plaintiff Class "only conclusory argued the traditional four-part test for preliminary injunctive relief" (*See* Def. Opp. Mot Show Cause at 1, n.1.) The Tenth Circuit has unequivocally held that a preliminary injunction may issue *only* if the movant has sufficiently established that there is a substantial likelihood of success on the merits, that they will suffer irreparable injury if the injunction is not granted, that the injury outweighs any harm that the preliminary injunction will cause to the Defendants, and that the preliminary injunction is in the public interest *See SCFC ILC, Inc. v. VISA USA, Inc.*, 936 F.2d 1096, 1098 (10th Cir. 1991) (citing *Otero Savings & Loan Ass'n. v. Federal Reserve Bank*, 665 F.2nd 275 (10th Cir. 1981)). Other than the conclusory sentence in their memorandum in support of their motion, Plaintiffs make

no effort to comply with this requirement (*See* Mem. Supp. Mot. Show Cause at 16.) This alone is a sufficient basis upon which to deny the request for injunctive relief. *See SCFC ILC, Inc. v. VISA USA, Inc.*, 936 F.2d at 1098. Moreover, the alleged injury—legislation which would not fully fund the indirect costs of the Class's contracts—is "speculative and remote, and if caused, would be created by Congressional legislation—not action taken by the defendant agencies." *Natural Resources Defense Council v. Lujan*, 768 F. Supp. 870, 879 (D.D.C. 1991) (citing *Wingfield v. Office of Management and Budget*, 9 Env't Rep. Case. 1961 (D.D.C. 1977))

Finally, as noted above, the Court also has serious concerns about the constitutional ramifications of the Class's proposed injunction. This Court will not infringe upon the Executive's "constitutional power to present [its] recommendations for legislation to the Congress." *Chamber of Commerce of the United States v. Department of Interior*, 439 F. Supp. 762, 767 (D.D.C. 1977) (citing U.S. CONST., ART. II, SEC. 3; *Wingfield*, 9 Env't Rep. Case. at 1963). As the Tenth Circuit has held, "it would thwart every constitutional canon for this court to order an arm of the Executive Department to demand action by the Legislative Department." *Smith v. United States*, 333 F.2d 70, 72 (10th Cir. 1964). The Class's proposal is even more revolutionary than merely ordering the Executive to not communicate with or to demand some action from the Legislature. The proposed form of Order attempts to prevent Congress from *enacting* or even considering the Department's plan by "suspending" it "by order of the Court." There is no authority which would justify such a complete abdication of the separation of powers doctrine. These are political questions reserved for the Executive and Legislative Departments; they are not matters within the province of the Judicial Department. *See Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 215 (1974) (holding "the presence of a political question suffices to prevent the power of the federal judiciary

from being invoked by the complaining party")

IT IS, THEREFORE, ORDERED that the Plaintiffs' Motion to Show Cause and For an Injunction to Control Defendants' Communications to the Class (Docket No. 304), filed August 3, 1999, is denied



UNITED STATES DISTRICT JUDGE