

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL <u>et al.</u> , on their own)	
behalf and on behalf of all persons similarly)	
situated,)	
)	
<u>Plaintiffs,</u>)	
)	
v.)	Civil
)	No. 96-1285 (TFH)
)	
KEN SALAZAR, Secretary of the Interior, <u>et al.</u> ,)	
)	
<u>Defendants.</u>)	

PLAINTIFFS’ UNOPPOSED MOTION TO CERTIFY THE TRUST ADMINISTRATION CLASS, APPOINT CLASS COUNSEL, APPROVE CLASS REPRESENTATIVES, AND MODIFY THE FEBRUARY 4, 1997 CLASS CERTIFICATION ORDER

Pursuant to Fed. R. Civ. P. 23, the December 7, 2009 Settlement Agreement in this matter and the Claims Resolution Act of 2010, Public Law 111-291 (Dec. 8, 2010; 124 Stat. 3064) (“Claims Resolution Act”), the Plaintiffs respectfully request that this Court certify the Trust Administration Class, consisting of beneficiaries with claims for trust land and funds mismanagement.

Further, Plaintiffs respectfully request that the Court approve Elouise Pepion Cobell, Penny Cleghorn, Thomas Maulson and James Louis LaRose (collectively, “Named Plaintiffs”) as Representatives for the Trust Administration Class and appoint Dennis M. Gingold, Thaddeus Holt and attorneys from Kilpatrick Stockton, LLP, Elliott H. Levitas, Keith Harper, William Dorris, David Smith, Adam Charnes and Justin Guilder (“Plaintiffs’ Counsel”) as counsel for that class. The Parties have met and conferred on this motion in accordance with local rules and defendants do not oppose this motion.

Finally, plaintiffs respectfully request that this Court modify the February 4, 1997 class

certification order in accordance with the terms of the December 7, 2009 Settlement Agreement, as amended, and the Claims Resolution Act.

FACTUAL SUMMARY

On February 4, 1997, this Court granted Plaintiffs' Motion for Class Certification pursuant to Fed. R. Civ. P. 23(b)(1)(A) and (b)(2) "on behalf of present and former beneficiaries of IIM Accounts (exclusive of those who prior to the filing of the Complaint herein had filed actions on their own behalf alleging claims included in the Complaint)," appointed class counsel and approved Ms. Cobell, Mildred Cleghorn, Thomas Maulson and James Louis LaRose as Class Representatives.¹ *See* Dkt. No. 27. On December 7, 2009 the parties entered into a Settlement Agreement (the "Settlement Agreement" or "Agreement"), which was modified substantively on November 17, 2010. Concurrent with the filing of this motion, the parties have filed a Joint Motion for Preliminary Approval of Settlement Agreement, and other related motions.

In the Settlement Agreement, the Parties agreed to ask this Court to certify a second plaintiff class consisting of individual Indian trust beneficiaries with Land and Fund Administration Claims.² Settlement Agreement at A.35. By and through the Claims Resolution Act of 2010, Public Law 111-291 (Dec. 8, 2010; 124 Stat. 3064 ("Claims Resolution Act")), Congress expressly approved of the Trust Administration class.³ Most members of the Trust Administration Class are also members of the Historical Accounting Class. Ms. Cobell, Mr. LaRose, Mr. Maulson, and Ms. Cleghorn are members of the Trust Administration Class.⁴

¹ Earl Old Person, a named plaintiff in the original complaint, was removed by order on March 5, 2003 [Dkt. No. 1864]. Mildred Cleghorn passed away in 1998 and her daughter Penny replaced her as a named plaintiff.

² Fund and Land Administration Claims are defined in the Settlement Agreement at A.14 and A.21, respectively.

³ *See* Claims Resolution Act § 101 (a)(10), (d)(2)

⁴ Members of the original certified plaintiff class, as reflected in the original complaint filed on June 10, 1996, have claims subsumed within the Historical Accounting Class (*e.g.*, claims for

The Named Plaintiffs have been representing the plaintiffs in this litigation for over 14 years and at all times have fairly and adequately represented the interests of unnamed class members. Plaintiffs' counsel, likewise, have actively and zealously represented the class in this litigation, have thoroughly investigated the claims presented in the Settlement Agreement and Amended Complaint, and have, and will continue to, vigorously prosecute the interests of class members.

ARGUMENT

I. Pursuant to the Settlement Agreement and the Claims Resolution Act, the Trust Administration Class Should be Certified.

The Trust Administration Class as defined in the Settlement Agreement, as amended, and approved by Congress is as follows:

Those individual Indian beneficiaries (exclusive of persons who filed actions on their own behalf, or a group of individuals who were certified as a class in a class action, stating a Funds Mismanagement Claim or a Land Mismanagement Claim, [as defined by the Settlement Agreement of December 7, 2009,] prior to the filing of the Amended Complaint) alive as of the Record Date and who have or had IIM Accounts in the "Electronic Ledger Era" (currently available electronic data in systems of the Department of the Interior dating from approximately 1985 to the present), as well as individual Indians who, as of the Record Date, had a recorded or other demonstrable ownership interest in land held in trust or restricted status, regardless of the existence of an IIM Account and regardless of the proceeds, if any, generated from the Land. The Trust Administration Class does not include beneficiaries, deceased as of the Record Date, but does include the estate of any deceased beneficiary whose IIM Accounts or other trust assets had been open in probate as of the Record Date. The estate of any Trust Administration Class Member who dies after the Record Date but before distribution is included in the Trust Administration Class.

Settlement Agreement § A.3.b.

Typically, when presented with a class established by settlement agreement, a court must "consider whether the proposed class meets the requirements of Federal Rule of Civil Procedure

trustee-delegates' failure to render an historical accounting) and the Trust Administration Class (e.g., claims for restitutionary relief related to defendants' loss, dissipation, and other injury to plaintiffs' trust assets).

23.” *Vista Healthplan, Inc. v. Warner Holdings Co. III, LLC*, 246 F.R.D. 349, 356 (D.D.C. 2007). However, such an analysis is unnecessary where, as here, Congress specifically has approved certification of the Trust Administration Class under Rule 23(b)(3). Section 101(d)(2)(A) of the Claims Resolution Act expressly provides that “[n]otwithstanding the requirements of the Federal Rules of Civil Procedure, the court in [this case] may certify the Trust Administration Class.” Additionally, Congress provided that “the Trust Administration Class shall be treated as a class certified under rule 23(b)(3) ... for purposes of Settlement.” *Id.* at § 101(d)(2)(B). It is well settled that Congress’ directive regarding the Federal Rules of Civil Procedure are conclusive and dispositive. *See, e.g., Shady Grove Orthopedic Assoc’s, P.A. v. Allstate Ins. Co.*, ___ U.S. ___, 130 S. Ct. 1431, 1438 (2010) (“Congress ... has ultimate authority over the Federal Rules of Civil Procedure; it can create exceptions to an individual rule as it sees fit – either by directly amending the rule or by enacting a separate statute overriding it in certain circumstances.”). In accordance with the Settlement Agreement and the Claims Resolution Act, which approves this settlement, the Parties respectfully request certification of the Trust Administration Class under Rule 23(b)(3).

II. The Interests of Class Members Will be Protected by the Proposed Class Representatives.

Fed. R. Civ. P. 23(a)(4) requires that this Court determine that “the representative parties will fairly and adequately protect the interests of the class.” *In re Vitamins Antitrust Litig.* (“*In re Vitamins*”), 209 F.R.D. 251, 261-62 (D.D.C. 2002). Rule 23(a)(4) necessitates an inquiry into both the adequacy of the proposed class representatives and class counsel. *See Johnson v. District of Columbia*, 248 F.R.D. 46, 53 (D.D.C. 2008); *In re Vitamins*, 209 F.R.D. at 261. There are two criteria for determining the adequacy of representation under Rule 23: “1) the named representative must not have antagonistic or conflicting interests with the unnamed members of

the class, and 2) the representative must appear able to vigorously prosecute the interests of the class through qualified counsel.”⁵ *Twelve John Does v. District of Columbia*, 117 F. 3d 571, 575 (D.C. Cir. 1997); *see also Harris v. Koenig*, No. 02-618(GK), ___ F.R.D. ___, 2010 WL 4553537, at *7 (D.D.C. Nov. 12, 2010); *Radosti v. Envision EMI, LLC*, 717 F. Supp. 2d 37, 52 (D.D.C. 2010). Here, both criteria are satisfied.

First, there is no conflict of interest between any Named Plaintiff and unnamed members of the Trust Administration Class. The Named Plaintiffs are members of that class and they will receive their distributions under the same formula as other class members. *See Settlement Agreement* at E.4.⁶ Moreover, throughout this difficult litigation, the negotiation of the Settlement Agreement, and the twelve-month effort to obtain legislative approval of the settlement, the Named Plaintiffs have pursued the same objectives of the class as a whole, *e.g.*, to establish liability, enforce trust duties, and obtain injunctive and monetary relief for breaches of fiduciary duties owed by the United States to the plaintiff class. *See Cohen v. Chilcott*, 522 F. Supp. 2d 105, 115 (D.D.C. 2007) (explaining there exists no conflict where named plaintiffs have the same goal of establishing liability of the defendants and recovering monetary relief).

Second, the Named Plaintiffs retained qualified counsel to pursue these claims on their behalf and on behalf of all class members. For over 14 years, Ms. Cobell and the other Named

⁵ It is not necessary for class representatives to have a detailed understanding of the nature and facts of their case, as long as they are willing and able to retain qualified class counsel who will vigorously prosecute the action on behalf of class members. *In re Vitamins*, 209 F.R.D. at 262; *Nat’l Ass’n of Reg’l Med. Programs, Inc. v. Mathews*, 551 F.2d 340, 345 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 954 (1977). “Only a ‘total lack of interest and unfamiliarity with [the] suit would be sufficient grounds to deny’” a motion for appointment of a class representative. *Harris v. Koenig*, ___ F.R.D. ___, No. 02-618(GK), 2010 WL 4553537, at *7 (D.D.C. Nov. 12, 2010) (*quoting In re Newbridge Networks Sec. Litig.*, 926 F. Supp. 1163, 1177 (D.D.C. 1996)). In this case, the necessary showing is plainly made.

⁶ That the Named Plaintiffs may receive incentive payments under the terms of the Settlement Agreement, *see id.* at K.2, does not create a conflict with other class members as such awards are within the discretion of this Court. *See, e.g., Radosti*, 717 F. Supp. 2d at 52-53; *Cohen v. Chilcott*, 522 F. Supp. 2d 105, 115 n. 2 (D.D.C. 2007).

Plaintiffs relentlessly have prosecuted this litigation. Their efforts have provided unprecedented benefits to beneficiary class, including elements of trust reform. *See, e.g., In re Vitamins*, 209 F.R.D. at 261 (proposed class representatives satisfactory where they “vigorously pursued th[e] lawsuit to date which has already yielded substantial benefits for all class members”). The unique record of these proceedings and the terms of settlement are powerful evidence of that vigor. They will continue to do so to ensure that the interests of Trust Administration Class members are fairly and adequately protected. Accordingly, their request for approval as Class Representatives in accordance with Rule 23(g) should be granted.

III. Plaintiffs’ Counsel Has Fairly and Adequately Represented the Interests of Class Members and Will Continue to do so.

In appointing class counsel, this Court is to consider (a) “the work counsel has done in identifying or investigating potential claims,” (b) “counsel’s experience in handling class actions, other complex litigation, and the types of claims asserted in the action,” (c) “counsel’s knowledge of the applicable law,” (d) “the resources that counsel will commit to representing the class,” and (e) “any other matter pertinent to counsel’s ability to fairly and adequately represent the interests of the class” Fed. R. Civ. P. 23(g)(1)(A) and (B). *See generally Bynum v. District of Columbia*, 384 F. Supp. 2d 342, 345 (D.D.C. 2005). Plaintiffs’ counsel has substantial aggregate experience litigating major civil actions and handling complex financial matters. They have a detailed knowledge of all applicable law. For 15 years, they have devoted substantial resources and time to the prosecution of this action, which has resulted in unprecedented relief for class members. *See Cohen*, 522 F. Supp. 2d at 115 (proposed class counsel acceptable where “they devoted substantial time and energy to litigating this action through settlement”). In these proceedings, they have acquired unique knowledge of the claims that affect Trust Administration Class members. *See Encinas v. J.J. Drywall Corp.*, 265 F.R.D. 3, 9 (D.D.C. 2010) (approving as

class counsel, attorneys who had spent substantial time and resources investigating potential claims); *Bynum*, 384 F. Supp. 2d at 345 (class counsel approved where did research into potential claims including taking numerous depositions, obtaining affidavits, performing interviews and analyzing computer records).

Here, plaintiffs' counsel have talked to thousands of trust beneficiaries and traveled repeatedly throughout Indian Country to collect and verify information about plaintiffs' claims, listen to plaintiffs' concerns, and explain the nature and scope of this litigation as well as the terms of settlement. Further, they have examined, in court and by deposition, scores of fact and expert witnesses, litigated 250 days of hearings and trials, briefed 10 interlocutory appeals, one *en banc* appeal, and two petitions for writs of certiorari. They will continue to expend their time and substantial resources on behalf of class members through the conclusion of this settlement.⁷

Accordingly, plaintiffs believe that the aforementioned counsel will fairly and adequately represent members of the Trust Administration Class and respectfully request that this Court grant their motion to appoint them as class counsel.

IV. The Historical Accounting Class Should be Modified in Accordance with the Settlement Agreement and Governing Law.

In the Settlement Agreement, the Parties agreed to seek modification of the February 4, 1997 class certification order. The modification is necessary to facilitate this settlement. Decisions of this Court and the court of appeals over the course of this litigation have had the effect of limiting those beneficiaries entitled to relief under allegations set forth in the Complaint.

⁷ On December 8, 2010, the President signed the Claims Resolution Act into law, which confers special jurisdiction to this Court to implement the Settlement Agreement. That law includes provisions covering Class Counsel, as defined in the Settlement Agreement, and refers to "Class Counsel." See Claims Resolution Act at § 101(a)(1): but referring to legislation at §2(c)(1) ("The Settlement is authorized, ratified, and confirmed."), and at §2.g) (covering awards of attorneys' fees to "Class Counsel"). "Class Counsel" is expressly defined in the Settlement Agreement. Settlement Agreement A.7.

The Parties concur that it is appropriate to modify the February 4, 1997 Class Certification Order by adopting a modified definition of the Historical Accounting Class which conforms to governing law. The proposed definition is as follows:

[T]hose individual Indian beneficiaries (exclusive of those who prior to the filing of the Complaint on June 10, 1996 had filed actions on their own behalf stating a claim for a historical accounting) alive on the Record Date [September 30, 2009] and who had an IIM Account open during any period between October 25, 1994 and the Record Date, which IIM Account had at least one cash transaction credited to it at any time as long as such credits were not later reversed. Beneficiaries, deceased as of the Record Date, are included in the Historical Accounting Class only if they had an IIM Account that was open as of the Record Date. The estate of any Historical Accounting Class Member who dies after the Record Date but before distribution is in the Historical Accounting Class.⁸

It is settled law that modification of a class certification rests in the sound discretion of the District Court and in this case - when entering the February 4th order - this Court expressly reserved its right to modify the order as the interests of justice may require. *See* Order Certifying Class Action at 2-3 (Feb. 4, 1997) [Docket No. 27]. *See also* Fed .R. Civ. P. 23(c)(1)(C) (An order certifying a class “may be altered or amended before judgment.”); *Lightfoot v. District of Columbia*, 246 F.R.D. 326, 334 n.6 (D.D.C. 2007) (discussing amendment of class certification order in light of developments in the case).

The definition of the Historical Accounting Class pursuant to this proposed modification, is in conformity with governing law.⁹ Accordingly, plaintiffs respectfully move this Court to so modify the February 4, 1997 class certification order in accordance with the terms of the Settlement Agreement and implementing legislation.

December 10, 2010

⁸ Settlement Agreement at 19.

⁹ *See also* Settlement Agreement at A.15.

Respectfully submitted,

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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing PLAINTIFFS' UNOPPOSED MOTION TO CERTIFY THE TRUST ADMINISTRATION CLASS, APPOINT CLASS COUNSEL, APPROVE CLASS REPRESENTATIVES, AND MODIFY THE FEBRUARY 4, 1997 CLASS CERTIFICATION ORDER was served on the following via facsimile, pursuant to agreement, on this day, December 10, 2010.

Earl Old Person (*Pro se*)
Blackfeet Tribe
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Browning, MT 59417
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/s/ Shawn Chick

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL <u>et al.</u> , on their own)	
behalf and on behalf of all persons similarly)	
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<u>Plaintiffs,</u>)	
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v.)	Civil Action
)	No. 96-1285 (TFH)
)	
KEN SALAZAR, Secretary of the Interior, <u>et al.</u> ,)	
)	
<u>Defendants.</u>)	

ORDER CERTIFYING TRUST ADMINISTRATION CLASS, APPOINTING CLASS COUNSEL, AND APPROVING CLASS REPRESENTATIVES FOR THE TRUST ADMINISTRATION CLASS, AND MODIFYING THE FEBRUARY 4, 1997 CLASS CERTIFICATION ORDER

The matter comes before this Court on Plaintiffs’ Unopposed Motion to Certify the Trust Administration Class, Appoint Class Counsel, Approve Class Representatives, and Modify the February 4, 1997 Class Certification Order (“Unopposed Motion”). Upon consideration of the proposed Settlement Agreement as modified on November 17, 2010; 28 U.S.C. § 1331; the Claims Resolution Act of 2010, Public Law 111-291 (Dec. 8, 2010; 124 Stat. 3064); Rule 23 of the Federal Rules of Civil Procedure, and the record of these proceedings, it is hereby

ORDERED that the Unopposed Motion is GRANTED. It is further

ORDERED that the February 4, 1997 Class Certification Order is modified and the Historical Accounting Class accordingly certified as follows:

[T]hose individual Indian beneficiaries (exclusive of those who prior to the filing of the Complaint on June 10, 1996 had filed actions on their own behalf stating a claim for a historical accounting) alive on the Record Date [September 30, 2009] and who had an IIM Account open during any period between October 25, 1994

and the Record Date, which IIM Account had at least one cash transaction credited to it at any time as long as such credits were not later reversed. Beneficiaries, deceased as of the Record Date, are included in the Historical Accounting Class only if they had an IIM Account that was open as of the Record Date. The estate of any Historical Accounting Class Member who dies after the Record Date but before distribution is in the Historical Accounting Class.

It is further

ORDERED, pursuant to Rule 23(b)(3) and § 101(d)(2) and the Claims Resolution Act of 2010, Public Law 111-291 (Dec. 8, 2010; 124 Stat. 3064), that the Trust Administration Class is accordingly certified as follows:

Those individual Indian beneficiaries (exclusive of persons who filed actions on their own behalf, or a group of individuals who were certified as a class in a class action, stating a Funds Mismanagement Claim or a Land Mismanagement Claim, as defined by the Settlement Agreement of December 7, 2009, prior to the filing of the Amended Complaint) alive as of the Record Date and who have or had IIM Accounts in the “Electronic Ledger Era” (currently available electronic data in systems of the Department of the Interior dating from approximately 1985 to the present), as well as individual Indians who, as of the Record Date, had a recorded or other demonstrable ownership interest in land held in trust or restricted status, regardless of the existence of an IIM Account and regardless of the proceeds, if any, generated from the Land. The Trust Administration Class does not include beneficiaries, deceased as of the Record Date, but does include the estate of any deceased beneficiary whose IIM Accounts or other trust assets had been open in probate as of the Record Date. The estate of any Trust Administration Class Member who dies after the Record Date but before distribution is included in the Trust Administration Class.

It is further

ORDERED that the following attorneys are appointed Class Counsel for the Trust Administration Class: Dennis M. Gingold, Thaddeus Holt, and attorneys from Kilpatrick Stockton, LLP – Elliott H. Levitas, Keith Harper, William Dorris, David C. Smith, Adam Charnes, and Justin Guilder. It is further

ORDERED that the following individual Indians are approved as Class Representatives for the Trust Administration Class: Elouise Pepion Cobell, James Louis LaRose, Thomas Maulson, and Penny Cleghorn.

IT IS SO ORDERED.

This _____ day of December 2010.

THOMAS F. HOGAN
UNITED STATES DISTRICT JUDGE

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FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL <u>et al.</u> , on their own)	
behalf and on behalf of all persons similarly)	
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<u>Plaintiffs,</u>)	
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v.)	Civil Action
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KEN SALAZAR, Secretary of the Interior, <u>et al.</u> ,)	
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<u>Defendants.</u>)	

ORDER CERTIFYING TRUST ADMINISTRATION CLASS, APPOINTING CLASS COUNSEL, AND APPROVING CLASS REPRESENTATIVES FOR THE TRUST ADMINISTRATION CLASS, AND MODIFYING THE FEBRUARY 4, 1997 CLASS CERTIFICATION ORDER

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ORDERED that the Unopposed Motion is GRANTED. It is further

ORDERED that the February 4, 1997 Class Certification Order is modified and the Historical Accounting Class accordingly certified as follows:

[T]hose individual Indian beneficiaries (exclusive of those who prior to the filing of the Complaint on June 10, 1996 had filed actions on their own behalf stating a claim for a historical accounting) alive on the Record Date [September 30, 2009] and who had an IIM Account open during any period between October 25, 1994

and the Record Date, which IIM Account had at least one cash transaction credited to it at any time as long as such credits were not later reversed. Beneficiaries, deceased as of the Record Date, are included in the Historical Accounting Class only if they had an IIM Account that was open as of the Record Date. The estate of any Historical Accounting Class Member who dies after the Record Date but before distribution is in the Historical Accounting Class.

It is further

ORDERED, pursuant to Rule 23(b)(3) and § 101(d)(2) and the Claims Resolution Act of 2010, Public Law 111-291 (Dec. 8, 2010; 124 Stat. 3064), that the Trust Administration Class is accordingly certified as follows:

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It is further

ORDERED that the following attorneys are appointed Class Counsel for the Trust Administration Class: Dennis M. Gingold, Thaddeus Holt, and attorneys from Kilpatrick Stockton, LLP – Elliott H. Levitas, Keith Harper, William Dorris, David C. Smith, Adam Charnes, and Justin Guilder. It is further

ORDERED that the following individual Indians are approved as Class Representatives for the Trust Administration Class: Elouise Pepion Cobell, James Louis LaRose, Thomas Maulson, and Penny Cleghorn.

IT IS SO ORDERED.

This _____ day of December 2010.

THOMAS F. HOGAN
UNITED STATES DISTRICT JUDGE