

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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ELOUISE PEPION COBELL, <u>et al.</u> ,	)	
	)	No. 1:96CV01285
Plaintiffs,	)	(Judge Hogan)
v.	)	
	)	
KEN SALAZAR, Secretary of	)	
the Interior, <u>et al.</u> ,	)	
	)	
Defendants.	)	
_____	)	

**INTERIOR DEFENDANTS’ MOTION FOR PERMISSION TO COMMUNICATE  
WITH CLASS MEMBERS REGARDING TRUST LAND CONSOLIDATION**

**BACKGROUND**

On December 23, 2002, the Court prohibited the parties, their agents, and their counsel from communicating with any class member regarding the litigation or the claims involved therein, absent an order from the Court permitting communication. On September 29, 2004, the Court amended the December 23, 2002, Order to include a ban on communications regarding the sale or transfer of land.

On December 7, 2009, the parties executed a Settlement Agreement that was contingent on the enactment of legislation to authorize and fund the settlement. A major part of the Settlement Agreement is the establishment of a Trust Land Consolidation Fund. Section F.1 of the Agreement provides: “Conditioned on the enactment of the necessary legislation, the Interior Defendants shall distribute the Trust Land Consolidation Fund in accordance with the Land Consolidation Program authorized under 25 U.S.C. §§ 2201 *et seq.*, any other applicable legislation enacted pursuant to this Agreement, and applicable provisions of this Agreement.” On November 17, 2010, the parties modified the Settlement Agreement to incorporate “certain

additional terms” into the Settlement Agreement “if such additional terms are included in the enacted legislation implementing the Settlement.” Attachment 1. One such term sets the amount of the Trust Land Consolidation Fund at \$1.9 billion. Another term related to the Trust Land Consolidation provides: “OPERATION – The Secretary shall consult with Indian tribes to identify fractional interests within the respective jurisdictions of the Indian tribes for purchase in a manner that is consistent with the priorities of the Secretary.” Attachment 1, Exhibit 1 at 3.

On November 30, 2010, the House of Representatives joined the Senate in passing the Claims Resolution Act of 2010 (the Act). Title I of the Act contains the *Cobell* settlement legislation. The President signed the Act into law on December 8, 2010. Claims Resolution Act of 2010, Pub. Law No. 111-291, 124 Stat. 3064 (2010). Title I, §101(e)(2), of the Act contains the provision requiring the Secretary of the Interior to consult with Indian tribes about the identification of fractional interests for the land consolidation program.

Representatives of the Indian tribes and their staff may in many instances also be class members in *Cobell*. Thus, the tribal consultation required under the Settlement and the Act require communication with class members. Such communications are prohibited by the December 23, 2002 and September 29, 2004 class communication orders. Interior Defendants thus request permission from the Court to engage in the necessary consultation.<sup>1</sup>

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<sup>1</sup> Defendants’ counsel conferred with Plaintiffs’ counsel about this motion on March 28, March 29, and April 4, 2011. Plaintiffs’ counsel indicated that Plaintiffs will oppose this motion.

## DISCUSSION

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

during the pendency of the instant litigation, the parties to the litigation, their agents and officials, and their counsel shall not communicate, through the United States mail or any other mode of communication, with any class member in this litigation regarding this litigation or the claims involved therein, except as specifically permitted by order of this Court.

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

during the pendency of the instant litigation, the parties to the litigation, their agents, representatives, employees, officials, and counsel shall not communicate, through the United States mail or any other mode of communication, with any member of the plaintiff class in this litigation regarding the sale, exchange, transfer, or conversion of any Indian trust land unless such communication is conspicuously marked with a notice that has been previously submitted to and approved by this Court.

Order of September 29, 2004 (Dkt. No. 2708).<sup>2</sup>

Any communication about the settlement necessarily involves communication “regarding this litigation or the claims involved therein” and thus would run afoul of the December 23, 2002 Order. Also, because the \$1.9 billion trust land consolidation is undisputedly a prominent feature of the settlement, communications regarding this aspect of the settlement might violate the September 29, 2004 Order.

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<sup>2</sup> On October 1, 2004, the Court clarified a separate provision in the September 29, 2004 Order, by limiting its impact to land sales communications. Order of October 1, 2004 (Dkt. No. 2713). On October 22, 2004, the Court further clarified the September 29, 2004 Order in several respects, including to specify that it does not apply to oral communications. *Cobell v. Norton*, 224 F.R.D. 266, 288 (D.D.C. 2004). On November 17, 2004, the Court clarified the specifics regarding the notice and waiver forms and procedure applicable to all written land sales communications. *Cobell v. Norton*, 225 F.R.D. 4 (D.D.C. 2004).

But both the Settlement Agreement and the Act mandate that Interior consult with Indian tribes about the trust land consolidation. This consultation process is expected to take several months and should begin soon. Interior needs to begin these government-to-government consultations soon to be ready should the agreement be finally approved by the court, to avoid losing valuable time to prepare for the potential disbursement of a significant amount of funds and the implementation of a substantially enlarged Interior program upon approval of the settlement. This consultation process will require communications with *Cobell* class members within the Indian tribes.

The Court recently permitted limited communications related to the settlement. On April 8, 2010, while the settlement legislation was still pending before Congress, the Court granted Interior Defendants' Unopposed Motion for Permission to Communicate with Class Members. Attachment 2, at 4 (April 8, 2010 Hearing Transcript); Attachment 3 (April 12, 2010 Minute Entry). The order permitted a small number of officials from the Department of the Interior to communicate with class members to provide information about, and otherwise discuss, the proposed settlement.

Now that Congress has enacted the Act and the Court has preliminarily approved the Settlement Agreement, broader communication authority is necessary. It is not feasible to have all communications about the trust land consolidation program funneled through the limited number of officials currently authorized to communicate with class members. In particular, Secretary Ken Salazar, Deputy Secretary David Hayes, and Solicitor Hilary Tompkins are currently authorized to communicate with class members, but the demands on their time from their multiple duties make it impossible for them to engage in the many

discussions and communications with those in Indian country needed to plan and implement the trust land consolidation program.

Therefore, pursuant to the terms of the December 23, 2002 Order, Interior Defendants ask the Court for permission for Interior officials generally to communicate with class members about the trust land consolidation program as envisioned in the Settlement Agreement, including communications that involve discussion about the transfer or sale of Indian land under that program.

**CONCLUSION**

For these reasons, Interior Defendants respectfully ask that the Court grant its motion.

Dated: April 6, 2011

Respectfully submitted,

TONY WEST  
Assistant Attorney General  
MICHAEL F. HERTZ  
Deputy Assistant Attorney General  
J. CHRISTOPHER KOHN  
Director

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

CERTIFICATE OF SERVICE

I certify that on April 6, 2011, *Interior Defendants' Motion for Permission to Communicate with Class Members Regarding Trust Land Consolidation* 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/ Robert E. Kirschman, Jr.  
Robert E. Kirschman, Jr.