

IN THE
UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL et al., on)
their own behalf and on behalf of)
all persons similarly situated,)
)
 Plaintiffs,)
)
 v.) Civil Action
) No. 96-1285 (RCL)
)
BRUCE BABBITT, Secretary of the)
Interior, et al.,)
)
 Defendants.)
)

PLAINTIFFS' MEMORANDUM
CONCERNING SCOPE OF CLASS AND RELATED MATTERS

At the hearing on November 23 (Tr. 31), plaintiffs undertook to file with the Court a statement with respect to the persons on whose behalf this lawsuit was filed and whom they understand to be members of the class.

Confusion has been injected by the government's effort to narrow the class simply to those trust beneficiaries that it has included in the reporting system currently being used, and in effect to define its trust duties by the scope of that reporting system – thus implying that the government can relieve itself of trust duties by failing to set up an adequate system.

Our understanding is as follows.

1. Every individual Indian (or, in appropriate cases, his heirs, estate, or personal representative) on whose behalf, as

trust beneficiary, a trust account is, has been, should be, or should have been maintained with the United States or its agent, is a member of the plaintiff class. An "account holder" and a "trust beneficiary" are simply two terms for the same person. Such accounts are commonly referred to as "individual Indian money accounts" ("IIM accounts"), to distinguish them from "tribal accounts," which reflect trusts for the benefit of tribes rather than of individual Indians.¹

2. Beginning in approximately 1985 and extending over several subsequent years, the government established an electronic database and associated accounting programs for the management of some, but not all, IIM accounts. It is operated by the Office of Trust Fund Management ("OTFM"), which until recently was part of the BIA but has been transferred to the Office of the Special Trustee. In this lawsuit, this database with its associated programs has sometimes been referred to as "the System" (more fully, "the OTFM IIM System"). An account, or an aspect of an account, has been said to be "on the System" if it is included in this database.² As is explained further

¹ There may be more than one account with respect to a class member. For example, a class member may have inherited an interest in a tract of timberland from her mother and an interest in a tract of grazing land from her father. Similarly, many different class members may have an interest in the same trust asset; for example, all the great-grandchildren of an original allottee of a tract may have interests in the tract. All are members of the class. So are their predecessors in interest.

² We have frequently spoken of "fixing the system" as one of the goals of this lawsuit. This does not refer to merely repairing the existing "System" (it is beyond repair), but to ensuring

hereinbelow, this current "System" does not define the plaintiff class, the total class of IIM accounts, or the scope of this action; there are many, many members of the plaintiff class whose accounts are not "on the System," and there are accounts on the current "System" that do not correspond to class members.

3. With respect to an undetermined number of class members, account management (or portions thereof) is performed not by an agency of the United States directly but by an Indian tribe, pursuant to a compact or contract between the United States and the tribe. For such an account, the tribe, in general, manages the money (and perhaps the underlying asset), holds it, and supposedly pays it over to the account holder (beneficiary). All such activity is conducted, however, by the tribe as agent for the trustee, the United States. It holds and pays the money as agent for the United States. For purposes of this lawsuit, such accounts and their accountholders (trust beneficiaries), including the money relevant thereto, stand on exactly the same footing as do the accounts and money managed directly by the United States and their accountholders (trust beneficiaries). Such an accountholder (trust beneficiary) is a class member just as is an individual whose account is managed directly by the defendants.

4. Contrary to the impression created by the government, we are aware of IIM accounts managed by tribes which are not "on the System" as of this time. Accountholders (trust

across the board that the management of individual Indian trusts is placed on a satisfactory basis.

beneficiaries) of accounts managed by tribes and not "on the System" are members of the class just as are accountholders (trust beneficiaries) with respect to whom the United States has not contracted out their account management.³ Note that when a beneficiary who is "on the System" has his account transferred to management by a tribe, prior transactions may remain "on the System" and his account may subsequently be automatically designated as "inactive" after no new transactions are reported on it for a period of time.

5. Some account holders (trust beneficiaries) may have never been "on the System" because they ceased to be accountholders (trust beneficiaries) before the current "System" was established. This does not affect the status of such persons as members of the class.

6. The foregoing are the two most important reasons now known to us that a class member's account(s) might be not "on the system." There may be many other reasons (including simple incompetence). We reiterate the basic point: The class is not limited to persons whose accounts are "on the System," nor does every account on the current "System" correspond to an individual trust beneficiary.

7. Defendants can be expected to allege certain defenses against various class members or categories of class members.

³ The Special Trustee, Paul Homan, testified at his deposition that all accounts, including those managed by the tribes, should be on the System; perhaps more accurately, all accounts, whether managed by tribes or by the government directly, should be on one single system. Correction of this situation will be an element of the relief sought in this case.

Examples are a claim that the statute of limitations bars a class member's rights because she cannot show equitable tolling; or a claim that the class member's agreeing to direct payment of his income directly from the lessee or other person who exploits his trust assets constitutes a knowing and informed waiver of certain rights against the trustee. The fact that these defenses might be asserted does not affect the status of such persons as class members.

8. We note some features of defendants' management of the trusts that can contribute to confusion and that underscore the fact that the class cannot be defined by reference to the current "System":

(a) The defendants have seriously confused the situation by actually including some trust accounts for the benefit of tribes on the current "System," although the current "System" is supposed to include only accounts for individuals. This category includes (i) so-called "tribal IIM accounts," which essentially reflect employment of the current "System" to manage tribal accounts for which it was not designed; and (ii) some accounts on the current "System" which reflect revenue derived from tracts of land in which both individuals and a tribe may hold beneficial interests. Tribes in the latter category will obviously benefit from the correction of accounts in the present case just as will individual class members, although they are not in the strict sense members of the class.

(b) In the current "System" there exist accounts called "special deposit accounts." While these should only hold money

of individual Indians, they reflect no class member (trust beneficiary) at all. Often carried in the name of an oil company or other lessee of a trust asset, they are accounts through which trust income may be passed before being distributed to the beneficiary's account.

(PricewaterhouseCoopers and Arthur Andersen disagree as to how these accounts should be treated in a sampling process, but that issue is not relevant here.)

(c) When a minor beneficiary with an account on the current "System" reaches the age of 18, his account is commonly relabeled "deceased," and a new account may be opened for him. The funds in the "deceased" account may or may not be transferred. After a stated period the current "System" automatically labels it as "inactive" and ceases to report relevant credit and debit transactions. The current "System" thus contains multiple or successor accounts which in reality reflect not merely the same class member but the same account.

(d) Defendants have permitted agency superintendents to declare persons "incompetent" on their own authority. When account management is transferred to a tribe by compact or contract, incompetents' accounts are generally not transferred and relevant credit and debit transactions may or may not appear "on the System."

9. We take this opportunity to point out a related misapprehension on the government's part. At p. 11 of "Defendants' Proposed Case Management Plan and Status Report" filed November 17, 1998, the government said: "The accounting

would be limited to determining whether the monies that were actually collected were properly accounted for in the IIM system and not whether the proper amount of money was collected."

(Emphasis added.) The underscored words improperly seek to limit the case to accounts and transactions which are "on the System" (as witness the proposition in the preceding sentence that "Defendants' accounting obligations are defined as accounting for money already existing in the system"). On the other hand, we agree with the government that "whether the proper amount of money was collected" is not an issue in the case – but not for the government's reasons. Under trust law, a trustee is presumed to have discharged its duty to the beneficiary and to have collected "the proper amount of money," whether or not the transaction is recorded accurately.

Respectfully submitted,

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