U.S. DISTRICT COURT
DISTRICT OF COLUMBIA
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CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

INTERIOR DEFENDANTS' MOTION FOR RECONSIDERATION OF
ORDER PROHIBITING COMMUNICATIONS WITH CLASS MEMBERS

On December 23, 2002, this Court issued a memorandum and order pursuant to Fed. R. Civ. P. 23(d), prohibiting the "parties to the litigation, their agents and officials, and their counsel" from communicating in any manner "with any class member in this litigation regarding this litigation or the claims involved therein." Memorandum and Order ("Op.") at 18-19. The court also referred several Department of Justice ("DOJ") attorneys to a disciplinary panel for possible violations of the ethics rule prohibiting contacts by attorneys with represented parties. Pursuant to Fed. R. Civ. P. 59(e), the Interior defendants respectfully move for reconsideration of the order prohibiting contacts with class members and referring various attorneys for disciplinary proceedings. On January 8, 2003, counsel for the Interior defendants conferred with plaintiffs' counsel regarding this motion and was advised that plaintiffs would oppose the motion.

The Court's ruling followed from its conclusion that the Interior defendants and their counsel had acted improperly by mailing historical statements of accounts to approximately 1,200 individual account

holders. The Court stated that it "does not find objectionable the fact that defendants mailed statements of accounts to individual class members." Op. at 9. The Court concluded, however, that it was "improper" for Interior to send "notices to individual class members that have the effect of extinguishing the rights of those class members without first seeking the approval of this Court." Id.

The premise of the Court's ruling is incorrect. The notices accompanying the historical account statements did not – and could not – extinguish the rights of any class member in this litigation. They simply informed account holders of the administrative process available to challenge inaccuracies or other problems in their statements. The issuance of the statements can have no effect on the ultimate questions presented by this litigation and cannot alter the scope any relief ordered. This is not a class action for individual damages under Fed. R. Civ. P. 23(b)(3), but rather an APA suit to vindicate the collective rights of class members to a historical accounting of IIM trust funds. The class was certified under Fed. R. Civ. P. 23(b)(1) and (b)(2), providing relief applicable solely to a class as a whole. Because class members have no notice and opt-out rights in such an action, they could not have agreed individually to "settle" their claims in this case. The predicate for this Court's ruling – that the notices accompanying the account statements could "extinguish individual rights" – is thus mistaken, and the consequent relief should be set aside.

The Court's referral order should be set aside for a second, independent reason. The account statements issued by the Department of the Interior were made in the regular course of business between Interior and its IIM beneficiaries. They did not constitute communications by the attorneys with represented parties concerning the subject matter of the representation. Moreover, the DOJ attorneys had no independent legal obligation to prevent Interior from itself making such communications. Thus, the

disciplinary referral under Rule 4.2(a) of the District of Columbia Rules of Professional Conduct is without foundation.

STATEMENT

1. Following the Court's 1999 ruling that plaintiffs are entitled to a historical accounting of all funds held in Individual Indian Money ("IIM") trust accounts, the Interior defendants have worked toward the goal of providing the necessary accountings to IIM beneficiaries. As of September 2002, Interior had completed the historical accounting work for approximately 7,900 IIM judgment accounts and had prepared statements for each of the account holders. These historical statements of account were prepared in addition to the accounting statements that Interior is required by statute to provide to account holders on a quarterly basis. See 25 U.S.C. § 4011(b).

2. On September 10, 2002, Interior notified the Court that it intended to provide historical statements of account to the 7,900 account holders whose statements had been completed. Because of Privacy Act concerns, Interior also sought permission from the Court to provide copies of the account statements to class counsel in this case. Provision of such statements is the type of conduct that the Secretary can and should take in implementing her statutory duties. Nevertheless, plaintiffs' counsel opposed Interior's motion and sought a temporary restraining order and a preliminary injunction preventing Interior from distributing these account statements on the ground that they would be misleading. Plaintiffs' counsel pursued such relief even though they had never even seen those statements. In response, Interior explained that nothing in this Court's prior orders or the D.C. Circuit's decision in Cobell v. Norton, 240 F.3d 1081 (D.C. Cir. 2001), "requires Interior to file a statement of account first with the Court and Plaintiffs' counsel before it can be sent to the beneficiary for whom the statement was prepared." Interior

Defs' Opp. to Consolidated Mot. for TRO and Prelim. Injunc., at 3. This Court did not rule on plaintiffs' request for injunctive relief.

3. On October 9 and 28, 2002, Interior sent approximately 1,200 historical statements of account to the parent or guardian of the account holder for whom they were prepared. In a cover letter accompanying the account statements (attached as Exhibit A), Interior explained the accounting results, the accounting approach, and what the account holder should do if he or she had concerns about the account statement or wished to file an administrative challenge with Interior's Office of Historical Trust Accounting ("OHTA"). Among other things, the letter informed account holders, "If you do not challenge the historical account statement or request an extension within 60 calendar days of the postmark on the envelope containing this letter, the enclosed Historical Statement of Account will be final and cannot be appealed." That statement informed account holders of the administrative appeals process available for them to challenge inaccuracies or other problems with their account statements. The letter made no reference to this case, much less to the release or satisfaction of any claims pending in this case, including the right to whatever form of historical accounting this Court might ultimately order in this case.

4. On October 10, 2002, plaintiffs filed a request for the referral of defense counsel to the disciplinary panel of this Court for unlawfully transmitting account statements to IIM trust beneficiaries. In that filing, plaintiffs again complained that the information contained in those statements was "false," but plaintiffs nowhere asserted that those statements constituted unethical contacts with represented parties or unlawful attempts to "extinguish" claims in this case.

5. On November 1, 2002, this Court heard oral argument on plaintiffs' preliminary injunction motion and expressed concern about certain information in the letter accompanying the account statements,

which informed account holders of the administrative process Interior had in place for handling questions or challenges to the accuracy of those statements. The Court directed supplemental briefing on the propriety of Interior's communication with class members.

6. In response to the Court's briefing order, Interior explained that communications between a fiduciary and its beneficiaries – even if the beneficiaries are class members in a pending case – are not prohibited to the extent they are made in the ordinary course of business. Interior Defendants' Supp. Opp. to Pls' Mot. for a Prelim. Injunc. Regarding Historical Statements of Account, at 4.[1] Interior further explained that its notification to IIM beneficiaries concerning the administrative procedures for disputing account statements was in no way misleading and, in fact, may have been required because the failure to provide such notice of the administrative process could itself be deemed misleading. Id. at 5-8. Nonetheless, in order to allay any concerns the Court might have concerning the overall accuracy of its notice, Interior offered to include notice of this case in any future statements to account holders and also offered to send out similar notices to any class members who had already received statements. Id. at 8-10.

7. On December 23, 2002, this Court issued a memorandum and order concluding that the Interior defendants had acted improperly by sending out statements to account holders that "have the effect of extinguishing the class members' rights to a full and accurate accounting after the defendants have 'fixed the system.'" Op. at 4. Focusing on a single sentence in the letter to account holders explaining their

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[1] Interior also noted that no ethical constraints required attorneys to prevent their clients from communicating with a represented party – particularly a party (such as a beneficiary) with whom the client has communications in the regular course of business – and explained that the "provision of historical statements of account was a communication by Interior to account holders and was not a communication initiated by, or on behalf of, counsel." Id. at 7 n.7.

administrative appeal rights, the Court asserted that "any ruling by this Court following Phase II will not apply to the class members who have received these statements because the statements purport to be final and non-appealable historical statements of account." Id. The Court concluded that, "[i]n effect, these members will be involuntarily opted out of Phase II of this litigation because they will not receive the benefits of any remedy that might be ordered." Id.

The Court expressly noted that it "does not find objectionable the fact that defendants mailed statements of accounts to individual class members," Op. at 9, but held that it was "improper" for the defendants to send "notices to individual class members that have the effect of extinguishing the rights of those class members without first seeking the approval of this Court." Id. Employing the same rationale, the Court also concluded that the statements to account holders necessarily constituted communications "about the subject matter of the representation" as defined in Model Rule of Prof. Conduct 4.2(a), rather than communications in the regular course of business. Id. at 16. The Court referred the six DOJ attorneys who appeared on Interior's motion notifying the Court that Interior was providing statements of historical accounts to the Court's Grievance Committee for investigation for violations of Rule 4.2(a), prohibiting communications by attorneys with parties concerning the subject matter on which they are represented by counsel.

Finally, invoking its equitable authority under Rule 23(d), the Court refused to authorize the mailing of 14,235 additional historical statements of account on the ground that it was not clear "whether these statements will contain notices that will extinguish the rights of these thousands of class members," and that the "prospect of this mass mailing thus presents a significant risk of serious interference with the rights of class members." Op. at 9. Although the Court expressly stated in its memorandum that Interior could

"continue engaging in the regular sorts of business communications with class members that occur in the ordinary course of business," id. at 10-11, the language of the Court's order sweeps far more broadly, prohibiting any communication by "the parties to the litigation, their agents and officials, and their counsel ... with any class member in this litigation regarding this litigation or the claims involved therein, except as specifically permitted by order of this Court." Id. at 18-19. "This restriction includes, but is not limited to, any communications that affect the rights of class members to a full and accurate accounting of the Individual Indian Money trust accounts." Id. at 19 (emphasis added).[2]

8. Although a broad construction of the Court's order would arguably preclude Interior officials, their agents, and even plaintiffs' counsel, from communicating with class members concerning any matter related to IIM trust accounts or a variety of other fiduciary activities – because these matters are all broadly "related to" this litigation – Interior has relied upon the Court's statements allowing day-to-day communications that the agency would otherwise be making independent of the litigation as a limitation on such a broad construction. Given the Court's statements that Interior may "continue engaging in the regular sorts of business communications with class members that occur in the ordinary course of business," Op. at 9, Interior understands the Court's order to bar only those communications with class members that could be construed as affecting their rights in this litigation, not any matter that arguably concerns this case. Thus, for example, if an IIM beneficiary called to inquire about the current balance in his IIM trust account, Interior would provide a response even though this could be construed as a communication with a class

[2] Although the Court's order also states that it "does not prohibit defendants from communicating with class members in the ordinary course of business on routine matters unrelated to the instant litigation," Op. at 19, it is not clear that this limits the order because virtually any matter concerning IIM trust accounts – whether routine or not – is arguably "related to" the litigation.

member concerning matters involved in this litigation. Likewise, Interior would respond to inquiries by an account holder concerning the status or timing of the next distribution from his or her account, because any other interpretation of the Court's order would needlessly impede the agency's ability to serve IIM trust account holders and communicate with the public about IIM trust matters. We are informing the Court of that understanding so that it may advise Interior immediately if this construction of the order is erroneous.

DISCUSSION

I. THE COURT ERRED IN CONCLUDING THAT INTERIOR'S STATEMENTS CONCERNING ADMINISTRATIVE APPEAL RIGHTS PURPORT TO EXTINGUISH CLASS MEMBERS' RIGHTS IN THIS CASE.

The fundamental predicate for this Court's holding that Interior's communications with class members were improper is that these communications "purport to extinguish the rights of class members." Op. at 4. That conclusion is mistaken, as is the Court's consequent decision to refer several DOJ attorneys to a disciplinary panel for possible violations of the ethics rule prohibiting contacts by attorneys with parties represented by counsel about matters in litigation. Accordingly, this Court should exercise its broad discretion to grant Interior's motion for reconsideration, see Cobell v. Norton, 226 F. Supp. 2d 175, 177 (2002), and should vacate its holding that Interior made improper communications with class members and rescind its referral of various DOJ attorneys for disciplinary investigation.

By sending statements of historical accounting to approximately 1,200 account holders and preparing such statements for an additional 6,700 account holders, Interior sought to fulfill its statutory obligation to perform historical accountings in a reasonable period of time. By including an explanation of the process whereby account holders could challenge the accuracy of their statements in administrative

proceedings, Interior sought to accurately represent the full range of options – and the applicable deadlines – to account holders. Indeed, had the agency not included such disclosures of administrative remedies, it could potentially have subjected itself to charges that it was providing misleading or incomplete information to account holders.

Contrary to this Court's conclusion, the notices did not "purport to extinguish" the rights of individual class members in this case. Nowhere in Interior's explanatory letter to account holders is there any reference to this case, much less to any settlement or release of claims in this case. Indeed, the sole statement that could even arguably be construed to "extinguish" any claims relates, on its face, solely to the administrative claims process to challenge the accuracy of the accounting statement provided. See 67 Fed. Reg. 57121 (Sept. 6, 2002). But that process in no way purports to supersede any proceeding under which this Court might ultimately conclude that a new or different accounting might be required. The notification made clear that recipients could bring to Interior's attention any information they believed relevant within a sixty-day period. Following that period, Interior would treat the individual accounting as final, absent further orders in this litigation calling into question the validity of the accountings under applicable statutory standards. In light of the Phase II proceedings identified by this Court to adjudicate the validity of any accountings, Interior's statements concerning the administrative "finality" of these account statements could not reasonably be construed as "extinguishing" any rights in this case.

The Court's ruling misconceives the nature of this action. The class in this case was certified under Fed. R. Civ. P. 23(b)(1) and (b)(2), provisions applicable solely to claims for general injunctive relief. This is an APA suit to vindicate the collective rights of class members to an accounting, not an action for individual damages under Rule 23(b)(3); class members have no notice and opt-out rights. See Eubanks

v. Billington, 110 F.3d 87, 92 (D.C. Cir. 1997) (noting absence of notice and opt-out rights in (b)(1) and (b)(2) class actions). Thus, there is no possibility that a class member could "settle" an individual claim in any way that could jeopardize the Court's authority to compel a complete historical accounting to benefit all class members.

In contrast, the case upon which this Court relied for the proposition that parties may not engage in communications with class members that have the effect of extinguishing their rights, Kleiner v. First National Bank of Atlanta, 751 F.2d 1193 (11th Cir. 1985), involved individual claims for monetary damages under Rule 23(b)(3). Although this Court stated in its memorandum that nothing in Kleiner would limit its applicability to claims under Rule 23(b)(2), Op. at 6 n.4, the concern with soliciting opt-outs is simply not present in a (b)(2) case, because "the defining characteristic of the (b)(2) class is that it seeks declaratory or injunctive relief applicable to the class as a whole." Eubanks, 110 F.3d at 92. More importantly, Kleiner involved clear-cut efforts by a defendant bank to solicit opt-outs that resulted in opt-out commitments from over 2,800 of the 3,000 potential class members contacted – even before many of the class members had received the court-approved notice of the class action. Kleiner, 751 F.2d at 1198. No similar conduct occurred in this case. Even if Interior's statements to account holders concerning their administrative appeal rights could conceivably be construed as affecting class members' rights to an accounting in this case – an inference that would be unwarranted given the context in which those statements were made – that is nothing like the express solicitation of opt-outs in Kleiner. Moreover, there is no evidence that any class members actually understood Interior to be attempting to extinguish their claims in this case; indeed, plaintiffs' counsel never made this argument until after the Court expressed concerns about this issue at the hearing.

The Court erred in its understanding of both the notice and the relief at issue when it concluded that, "[b]ecause of the wording in the notices included in the statements . . . any ruling following Phase II will not apply to the class members who have received these statements because the statements purport to be final and non-appealable historical statements of account." Op. at 4. The availability of any remedy in this litigation depends solely on membership in the class. So long as an individual is a class member, he or she will not "be involuntarily opted out of Phase II of this litigation." Id.

Interior was not required to include an express disclaimer that the failure to pursue administrative remedies would not affect any class members' rights in this case. Indeed, such a disclaimer would have been peculiar – and perhaps confusing – in a letter to account holders that nowhere referenced this case in any form, and thus could not reasonably be construed as settling claims arising from it. Nonetheless, once the Court raised this issue – at the November 1, 2002 hearing – Interior promptly offered to include a notice concerning this case in future statements to account holders and to provide a supplemental notice to the account holders who have already received statements.[3] See Interior Defs' Supp. Opp. to Pls' Mot. for a Prelim. Injunc. Regarding Historical Statements of Account, at 8. Interior again renews its offer to provide an express statement to account holders that any failure to file an administrative appeal within the 60 day period does not extinguish the beneficiary's right to an accounting as may be determined in this case.

[3] Prior to the hearing, plaintiffs never opposed the distribution of account statements to class members on the grounds that they purported to extinguish class members' rights in this case. Instead, without having reviewed the statements, plaintiffs argued solely that they were inaccurate. Interior thus had no occasion to address this issue until the Court raised it at the November 1, 2002 hearing.

II. THE COURT'S REFERRAL OF DOJ ATTORNEYS FOR A DISCIPLINARY INVESTIGATION IS INDEPENDENTLY WITHOUT LEGAL BASIS BECAUSE ATTORNEYS HAVE NO DUTY TO PREVENT THEIR CLIENTS FROM MAKING COMMUNICATIONS WITH REPRESENTED PARTIES.

As explained above, the communications by Interior to IIM account holders were made in the regular course of business and did not extinguish the rights of class members in this case. They were thus appropriate. Even assuming those communications could be characterized as in some way improper, the Court's referral of DOJ attorneys for allegedly engaging in improper communications with represented parties in violation of Rule 4.2(a) of the District of Columbia Rules of Professional Conduct is unwarranted, because the attorneys themselves did not make the communications to the class members.

"[T]here is nothing [in the professional rules of conduct] that prohibits one party to a litigation from making direct contact with another party to the same litigation." EEOC v. McDonnell Douglas Corp., 948 F. Supp. 54, 55 (E.D. Mo. 1996). Moreover, the DOJ attorneys were under no obligation to prevent communications made by their client (Interior) to its IIM account holders. See Miano v. AC&R Advertising, Inc., 148 F.R.D. 68, 81-90 (S.D.N.Y. 1993), adopted and approved, 834 F. Supp. 632 (S.D.N.Y. 1993). Indeed, the ABA has withdrawn its prior opinions which had held that Rule 4.2(a) was violated if an attorney failed to discourage his client from contacting the opposing party. See ABA Comm. on Ethics and Prof. Responsibility, Formal Op. 84-350 (May 7, 1984). Likewise, the D.C. Circuit has made clear that an attorney is not responsible for communications made by another unless that person is acting as the attorney's "alter ego." See United States v. Lemonakis, 485 F.2d 941, 956 (D.C. Cir. 1973), cert. denied, 415 U.S. 989 (1974). Because the communications at issue were clearly made in the regular course of business between Interior and its IIM beneficiaries, no basis exists for a disciplinary referral under

Rule 4.2(a).

Finally, the Court could not properly discover a violation of an ethical duty by six DOJ attorneys on the sole ground that their names appear on the signature block on the September 10, 2002 motion that informed this Court that Interior would be sending statements of historical account to certain IIM account holders. The DOJ attorneys are thus being referred for disciplinary action for representing their clients in court and providing the court with notice that their client would be sending statements to IIM account holders. That referral is improper.

CONCLUSION

For the foregoing reasons, the Court should grant the Interior defendants' motion for reconsideration, vacate its order holding that Interior made improper communications with class members, and rescind its referral of government attorneys for disciplinary investigation.

Respectfully submitted,

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January 8, 2003

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

ORDER

This matter comes before the Court on Interior Defendants' motion for reconsideration of order prohibiting communications with class members. After considering that motion, any responses thereto, and the record of the case, the Court finds that the motion for reconsideration should be, and hereby is, GRANTED. It is further

ORDERED that the Court's order dated December 23, 2002, pursuant to Rule 23(d) is vacated, and it is further

ORDERED that the Court's referral of government attorneys for disciplinary investigation set forth in the Rule 23(d) order is rescinded.

SO ORDERED this ___ day of _____, 2003.

ROYCE C. LAMBERTH
United States District Judge

cc:

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United States Department of the Interior

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Washington, DC 20240
Phone (202) 327-5300
Fax (202) 327-5375

October 9, 2002

Parent(s) or Guardian of
John H. Doe
P. O. Box xxxx
Whiteriver, AZ xxxxx

Re: Individual Indian Money Account # 607JXXXXXX

Dear Parent(s) or Guardian:

This letter and the three enclosures are being sent to you because you are the parent(s) or guardian of the above-named account holder, who has at least one Individual Indian Money (IIM) account managed by the United States Department of the Interior (DOI). This letter and the three enclosures apply only to the IIM account which contains a share of settlement monies received by the account holder's tribe, the White Mountain Apache Tribe of Arizona. DOI's Office of Historical Trust Accounting (OHTA) recently performed an accounting of this account from the time it was opened through December 31, 2000. You will find a Historical Statement of Account enclosed with this letter. Please read the following information in this letter and the three enclosures carefully. They provide you with the following important information about the account.

- Accounting Results: Important information about the account, including limitations on the accounting and whether errors or losses were detected
- Accounting Approach: How the historical accounting was performed
- What You Should Do Next: Important deadlines for responding to and challenging the historical accounting
- Your Appeal Rights: How you can appeal to the Interior Board of Indian Appeals (IBIA)
- Questions: Who will answer questions and where you may obtain additional information

Accounting Results. The account was established for the account holder in 1997 to receive a share of a payment that was made to settle a claim filed as White Mountain Apache Tribe of Arizona v. United States, Court of Federal Claims Docket No. 22-H. As an enrolled member of the White Mountain Apache Tribe as of April 29, 1997, the account was credited with a payment of $[redacted] on November 3, 1997. As of December 31, 2000, the account balance totaled $[redacted], including interest of $[redacted]

The balance shown on the Historical Statement of Account as of December 31, 2000, agrees with the balance maintained by DOI's Office of Trust Funds Management (OTFM) as of the same date. The accompanying Historical Statement of Account details the receipts, interest, and other activity for the account holder's account from the opening deposit through December 31, 2000. **Please note that the account balance shown is for December 31, 2000.** For information about the account activity and balances after December 31, 2000, please refer to the Statement of Account sent to you quarterly by OTFM. In addition, the Historical Statement of Account does not reflect any funds or transactions for the other accounts which the account holder may have with OTFM.

DOI has identified several historical accounting issues that may affect the amount of interest paid to the account. Please read the enclosed *Statement of Accounting Limitations* to learn more about these important issues and how they might affect the account.

Accounting Approach. In performing the 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. OHTA also verified the monthly interest based on the interest rate distribution factor determined by OTFM. An independent accounting firm reviewed the historical accounting work to ensure correctness.

EXHIBIT A
Interior Defendants' Motion
for Reconsideration

What You Should Do Next. OHTA completed the enclosed Historical Statement of Account for the time from the opening of the account through December 31, 2000. You should compare the Historical Statement of Account to your files and records to determine if your records agree with the Historical Statement of Account and the balance it shows on December 31, 2000.

If you agree with the Historical Statement of Account and the balance shown, please retain this letter and the three enclosures with your records. No other action is required of you.

If you have concerns about the Historical Statement of Account included with this letter or if you believe it is in error, you may wish to file a challenge with OHTA. To challenge the enclosed Historical Statement of Account, you must provide a written explanation of your concerns and any documents, papers or information you want OHTA to consider within 60 calendar days of the postmark on the envelope containing this letter. You must mail this information to the following address.

Executive Director
Office of Historical Trust Accounting
U.S. Department of the Interior
1801 Pennsylvania Avenue, NW, Suite 400
Washington, DC 20006

If you need more than 60 calendar days to review or challenge the Historical Statement of Account, you may request a 30-calendar-day extension by contacting OHTA in writing at the address stated above before the 60-calendar-day time expires. **If you do not challenge the historical account statement or request an extension within 60 calendar days of the postmark on the envelope containing this letter, the enclosed Historical Statement of Account will be final and cannot be appealed.**

If you wish to challenge the Historical Statement of Account, OHTA will consider any explanation you provide and respond to you within 30 calendar days of the postmark on the envelope containing your challenge. OHTA's conclusions on your challenge will be provided in writing and will be clearly indicated as OHTA's final response.

Your Appeal Rights. You may appeal OHTA's final response to the Interior Board of Indian Appeals (IBIA) by filing a Notice of Appeal with IBIA within 30 calendar days of the date you receive OHTA's final response. OHTA will provide you with information about how to appeal to IBIA when it sends you its final written response.

Detailed rules and guidance for filing a Notice of Appeal with the IBIA can be found in Title 43 part 4 of the *Code of Federal Regulations* and in the Federal Register Notice published September 6, 2002 (67 Fed. Reg. 57121). These sources describe the items you must include in your Notice of Appeal.

The Historical Statement of Account provided with this letter will not be final or effective until after you have exhausted all administrative remedies and appeals (as above, to OHTA and IBIA) or until after the deadlines for doing so have otherwise expired.

Questions. Enclosed is a brochure answering general questions about the historical accounting project. If you have any questions about this letter or the enclosed Historical Statement of Account, please call OHTA toll-free at 1-888-329-5562. Also, additional background information, including a report OHTA provided to the United States Congress about its historical accounting project, is available on the Internet at **http://www.doi.gov/ohta**.

Very truly yours,

Bert T. Edwards

Bert T. Edwards, Executive Director
Enclosures (3) - Historical Statement of Account, Brochure, and Statement of Accounting Limitations

Statement of Accounting Limitations

In preparing the enclosed Historical Statement of Account, the Department of the Interior (DOI) identified several system-wide accounting issues that involve the amount of interest credited to trust fund accounts. These issues have not yet been fully resolved by DOI since DOI must complete additional research on the issues.

By statute and policy, funds in the Individual Indian Trust Fund have, typically, been invested in securities issued by the U.S. Treasury and U.S. Government sponsored entities. Maturities range from overnight investments with the U.S. Department of the Treasury to over ten years with a large concentration in the 5-10 year sector.

DOI's Office of Trust Funds Management (OTFM) determines the monthly interest factor to credit interest to each IIM account based on the total interest earnings for the month and the total average dollar balances of IIM accounts for the month. The interest factor used to determine the amount of interest credited to the account changes with the total amount of invested funds and the prevailing rates of interest. For the information, attached is a comparative summary of interest rates on investment pools similar to the IIM Trust Fund.

DOI has identified potential discrepancies that may affect invested funds accruing interest. Although DOI believes that these discrepancies are nominal, they may have a small impact on the amount of interest credited to the account. DOI has requested an appropriation from Congress to address certain issues. If this appropriation is received, DOI will make appropriate adjustments.

While the account holder's IIM account may be credited with additional interest in the future, the Historical Statement of Account is a crucial, important step in completing the overall historical accounting project for all Individual Indian Money accounts. As a result of the work performed on the accompanying Historical Statement of Account, DOI has confirmed several things.

- The initial deposit into the IIM account was correct.
- No improper disbursements were made from the account through December 31, 2000.
- The interest calculated by OTFM, based on the monthly interest distribution factor, was properly applied to the account.

As our work on the historical accounting project progresses, DOI will confirm the amount of additional interest the account may be entitled to, and explain to you how any such interest was determined.

It is not necessary for you to register a challenge to the accompanying Historical Statement of Account **(with respect to interest only)** since DOI is aware of this issue which may impact a large number of IIM accounts. If DOI determines that additional interest should be credited to the account in the future, this will be done whether or not you challenge the accuracy of the enclosed Historical Statement of Account.

COMPARATIVE INTEREST FACTORS

Month	IIM OTFM Factor[1]	10-Year Treasury Rates[2]	TSP "G" Fund[3]
November 1997	7.38	5.86	6.00
December 1997	6.47	5.74	6.24
January 1998	7.31	5.63	6.12
February 1998	6.21	5.63	5.28
March 1998	6.64	5.63	6.00
April 1998	6.90	5.67	5.88
May 1998	6.48	5.57	6.12
June 1998	6.95	5.46	5.76
July 1998	6.57	5.50	5.88
August 1998	6.43	5.20	5.88
September 1998	7.77	4.67	5.28
October 1998	6.60	4.63	4.92
November 1998	7.38	4.83	5.04
December 1998	6.87	4.75	5.16
January 1999	6.68	4.72	5.04
February 1999	5.71	5.00	4.56
March 1999	6.90	5.23	5.64
April 1999	6.16	5.26	5.52
May 1999	6.14	5.56	5.64
June 1999	6.39	5.98	5.88
July 1999	6.23	5.86	6.24
August 1999	6.69	5.81	6.36
September 1999	6.53	5.88	6.12
October 1999	6.85	6.16	6.36
November 1999	6.26	6.10	6.12
December 1999	6.57	6.41	6.18
January 2000	6.50	6.68	6.72
February 2000	6.25	6.38	6.36
March 2000	6.61	6.13	6.60
April 2000	6.96	6.15	6.24
May 2000	6.39	6.42	6.48
June 2000	6.62	6.08	6.36
July 2000	6.31	6.04	6.36
August 2000	6.31	5.75	6.24
September 2000	6.85	5.82	5.88
October 2000	6.14	5.66	6.12
November 2000	6.27	5.65	5.76
December 2000	6.5	5.1	5.76

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[1] OTFM; Albuquerque, NM

[2] McCary Stevens Associates Inc. (Rates at which new issues of 10-year United States Government (USG) bonds were issued)

[3] Thrift Savings Plan website www.tsp.gov/rates/history/html. The TSP "G" Fund is similar to an IRS section 401(k) Plan. The TSP "G" Fund invests solely in USG debt securities and debt securities guaranteed by the USG.

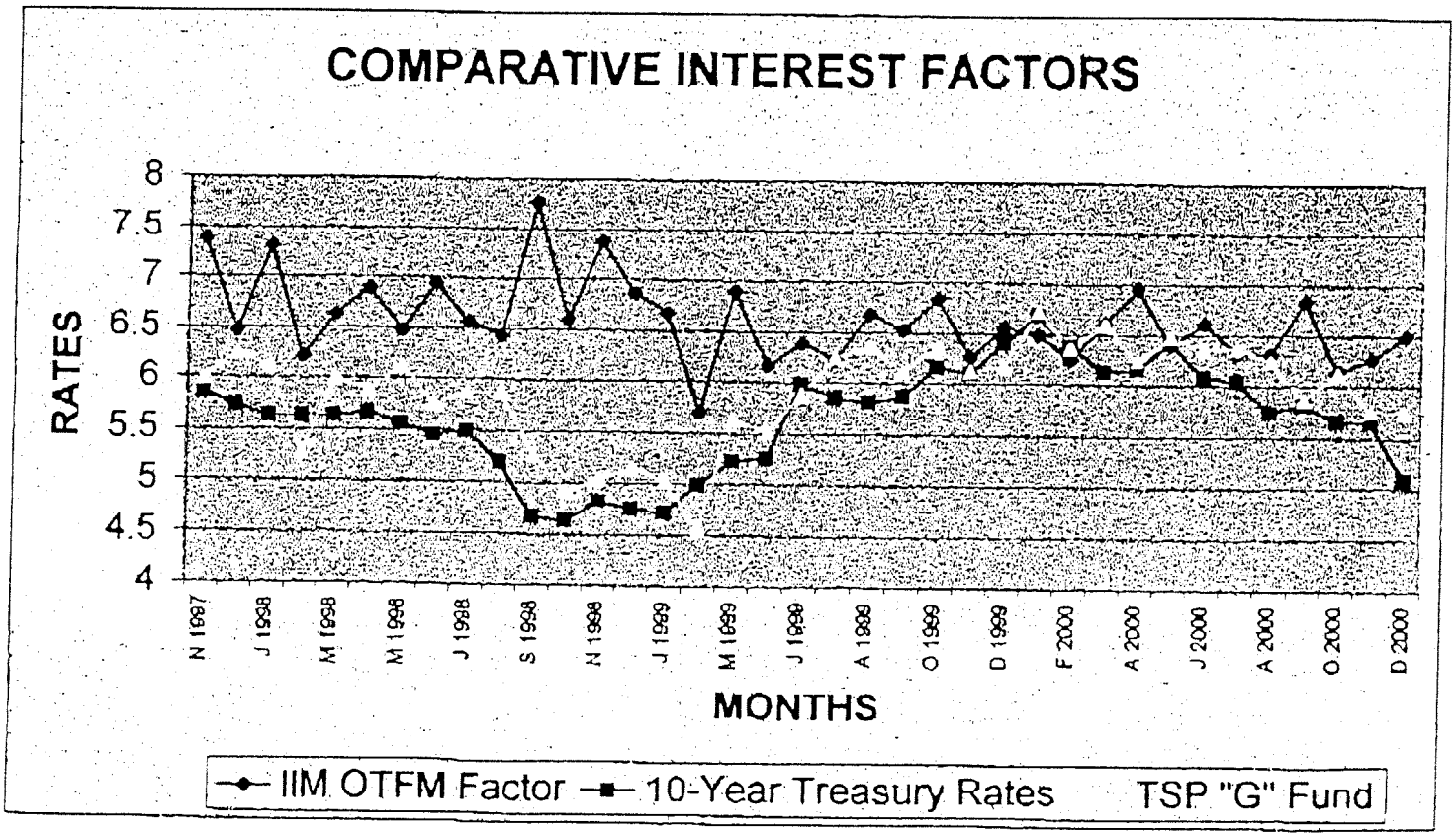
There are a number of mutual funds where objective is to invest principally in USG securities or securities guaranteed by the USG. Unlike the IIM Trust Fund investments, a portion of the investments of the following mutual fund is invested in derivatives such as repurchase agreements. Generally derivatives represent higher risk factor, and thus a higher return, than USG securities. Monthly rates of return for the following mutual funds are not readily available, however, annual rates of return are set forth below.

Fund	1998	1999	2000
T. Rowe Price – U. S. Treasury – Intermediate Fund (3 – 10 year terms)	9.58%	4.28%	1.97%

1997 – 2001 Average Rates of Return – Intermediate Term (3 – 10 year terms) – USG Bonds

Vanguard (VFITX) – 8.2%
Galaxy II (IUTIX) – 7.8%
American Century (CPTNX) – 7.6%
Fidelity Spartan (SPGVX) – 7.6%

Source: www.aaii.com/promo/2002.0513/mfunds2.shtml



How to Read Your Historical Statement of Account

Your Historical Statement of Account describes the transactions associated with either a judgment account or a per capita Individual Indian Money (IIM) account. If your IIM account is a judgment account, money was awarded to the Tribe as the result of a lawsuit and then distributed to each enrolled member of the Tribe. Per capita funds also represent Tribal payments to individuals, but the money comes from a source other than a judgment award, such as Tribal timber sales. The details of your account are included in the Historical Statement of Account.

Account Statement

Your account opens with a beginning balance of zero. The first transaction identifies the judgment or per capita payment made into your account. Each entry after that represents a transaction occurring in the account. A date and description of each transaction is included in your statement. Your statement ends with the account balance as of December 31, 2000. THIS IS NOT THE CURRENT BALANCE. Unless otherwise stated in the cover letter, our review of your account concludes that the judgment or per capita payment, account transactions, and the December 31, 2000, balance are correct.

What Should I Do With This Historical Statement of Account?

Carefully review the Historical Statement of account and compare it to your records.

If you agree with the results shown on the account statement, please retain it with your other records.

If you wish to challenge the results shown on the account statement:

1. Provide a written explanation and any supporting documents within 60 calendar days of the postmark on the envelope to:

Executive Director
Office of Historical Trust Accounting
U.S. Department of the Interior
1801 Pennsylvania Ave., N.W., Suite 400
Washington, D.C. 20006

2. If you need more than 60 days to review or challenge the Historical Statement of Account, you may request a 30-day extension by contacting Office of Historical Trust Accounting (OHTA) in writing at the address shown above.

3. If you do not challenge the account statement or request an extension within 60 calendar days of the postmark on the envelope containing this letter and statement, the account statement will be final and cannot be appealed.

4. OHTA will consider any explanation you provide and respond to you within 30 calendar days from the postmark on your challenge. OHTA's conclusions on your challenge will be provided in writing and will be indicated as OHTA's final response.

- If after receiving a written notice from OHTA indicating it is a final response, you wish to appeal the account statement, you must file a Notice of Appeal with the Interior Board of Indian Appeals (IBIA) within 30 calendar days of receipt of OHTA's final response which will clearly be identified "Final Response." Together with its final response, OHTA will furnish you with information about how to file an appeal with IBIA.

Information on the rules and guidance for filing a Notice of Appeal with IBIA can be found in Title 43 part 4 of the *Code of Federal Regulations* and in the *Federal Register* notice published September 6, 2002.

Questions and Answers

Why are you receiving this account statement?

The American Indian Trust Fund Management Reform Act of 1994 provides that IIM account holders be given an accounting of the funds held in trust. Your Historical Statement of Account has been prepared to assist you in understanding the transactions affecting the funds in your account.

Why does the historical accounting end on December 31, 2000?

December 31, 2000, was selected because all Bureau of Indian Affairs (BIA) Regions and Agencies had converted to the Trust Funds Accounting System (TFAS) by this date. Quarterly statements have been mailed for IIM accounts since early 2000, except for estate accounts and account holders whose current address is unknown.

Will you receive a check for the balance shown?

No, this accounting is similar to a bank statement. The purpose of the accounting was to review your account and make sure it was correct as of December 31, 2000.

Questions and Answers (continued)

Are you owed money?

The amount shown on your Historical Statement of Account represents the balance of your IIM account on December 31, 2000. For information regarding account activity and balances after December 31, 2000, please refer to the quarterly Statement of Account sent to you by the Department of the Interior Office of Trust Funds Management (OTFM). The amount shown on your most recent Statement of Account is the balance held in trust for you as of the date of the Statement, and will be paid subject to applicable terms of your account.

What time period is covered by the historical accounting?

Your Historical Statement of Account begins with the date the account was opened and concludes on December 31, 2000. The account balance shown for December 31, 2000, is NOT THE CURRENT BALANCE.

How can you find out your IIM account activity after December 31, 2000?

OTFM periodically provides a Statement of Account for IIM accounts. The most recent Statement of Account provided by OTFM will include the balance for your IIM account as of the date of that Statement. If you wish to obtain the current balance, you should contact your local BIA Agency Office or OTFM toll free at 1-888-OST-OTFM (888-678-6836).

Does your Historical Statement of Account cover any other IIM accounts you may have?

No, your Historical Statement of Account only addresses the transactions occurring for the judgment or per capita account number identified on the Historical Statement of Account.

How can you report a change of address?

Historical statements of account for judgment accounts are being sent to the parents or guardians or IIM account holders. To report a change in address, please call or write your local BIA Agency office. In an attempt to locate IIM account holders whose account statements are returned to OHTA by the U.S. Postal Service as not deliverable, the names of those whose Historical Statement of Account is returned will be posted on the OHTA website, **www.doi.gov/ohta**. These names will also be available for review at your Tribal Headquarters, BIA Agency offices, and OTFM locations.

Where Can I Get More Information?

You can request more information by mail, telephone, or internet.

Mail:

U.S. Department of the Interior
Office of Historical Trust Accounting
1801 Pennsylvania Avenue, N.W., Suite 400
Washington, DC 20006

Telephone:
1-888-329-5562

Electronic Mail: OHTA@ios.doi.gov

U.S. DEPARTMENT OF THE INTERIOR

Information On Historical Accounting of Judgment and Per Capita IIM Accounts

OFFICE OF HISTORICAL TRUST ACCOUNTING
INDIVIDUAL INDIAN MONIES TRUST FUNDS
HISTORICAL STATEMENT OF ACCOUNT

TO THE PARENT(S) OR GUARDIAN OF
[redacted]
PO BOX [redacted]
WHITERIVER AZ 85941

ACCOUNT OF [redacted]
ACCOUNT NUMBER [redacted]

As explained in the attached Historical Statement of Account transmittal letter, the account balance at December 31, 2000 was $[redacted].

This balance was composed of the following:

Judgment award from Docket 22-H	$[redacted]
Cumulative interest	[redacted]
Ending balance as of December 31, 2000	$[redacted]

The account activity is detailed below. Interest was calculated based on average daily balance using the interest factor determined for each period by Interior's Office of Trust Funds Management. This factor, which may vary by period, is based upon the IIM Trust Funds' investments. Please note, the account balance shown is for December 31, 2000 (the date through which the historical accounting was performed). For account activity and balances after December 31, 2000, please refer to the quarterly Statements of Account.

TRANSACTION ACTIVITY FOR ACCOUNTING PERIOD: 11/3/1997 THROUGH 12/31/2000

DATE	AMOUNT	TRANSACTION DESCRIPTION	DOCUMENT REFERENCE (If calling, this information may be needed.)
	[redacted]	BEGINNING BALANCE	
11/3/1997	[redacted]	Receipt of judgment award - Docket 22-H	Collection JUDGMENT PER CAPITA [redacted]
12/18/1997	[redacted]	Monthly Interest	Journal Voucher MONTHLY - AUTO [redacted]
1/15/1998	[redacted]	Monthly Interest	Journal Voucher MONTHLY - AUTO [redacted]
2/19/1998	[redacted]	Monthly Interest	Journal Voucher MONTHLY - AUTO [redacted]

DATE	AMOUNT	TRANSACTION DESCRIPTION	DOCUMENT REFERENCE (If calling, this information may be needed.)
3/30/1998	[redacted]	Monthly Interest	Journal Voucher MONTHLY - AUTO [redacted]
4/27/1998	[redacted]	Monthly Interest	Journal Voucher MONTHLY - AUTO [redacted]
5/28/1998	[redacted]	Monthly Interest	Journal Voucher MONTHLY - AUTO [redacted]
6/26/1998	[redacted]	Monthly Interest	Journal Voucher MONTHLY - AUTO [redacted]
7/30/1998	[redacted]	Monthly Interest	Journal Voucher MONTHLY - AUTO [redacted]
8/21/1998	[redacted]	Monthly Interest	Journal Voucher MONTHLY - AUTO [redacted]
9/28/1998	[redacted]	Monthly Interest	Cash Receipt MONTHLY INTEREST EARNINGS DOCUMENT #[redacted]
10/30/1998	[redacted]	Monthly Interest	Cash Receipt MONTHLY INTEREST EARNINGS DOCUMENT #[redacted]
11/19/1998	[redacted]	Monthly Interest	Cash Receipt MONTHLY INTEREST EARNINGS DOCUMENT #[redacted]
12/18/1998	[redacted]	Monthly Interest	Cash Receipt MONTHLY INTEREST EARNINGS DOCUMENT #[redacted]
1/14/1999	[redacted]	Monthly Interest	Cash Receipt MONTHLY INTEREST EARNINGS DOCUMENT #[redacted]
2/18/1999	[redacted]	Monthly Interest	Cash Receipt MONTHLY INTEREST EARNINGS DOCUMENT #[redacted]
3/18/1999	[redacted]	Monthly Interest	Cash Receipt MONTHLY INTEREST EARNINGS DOCUMENT #[redacted]
4/19/1999	[redacted]	Monthly Interest	Cash Receipt MONTHLY INTEREST EARNINGS DOCUMENT #[redacted]

DATE	AMOUNT	TRANSACTION DESCRIPTION	DOCUMENT REFERENCE (If calling, this information may be needed.)
5/18/1999	[redacted]	Monthly Interest	Cash Receipt MONTHLY INTEREST EARNINGS DOCUMENT [redacted]
6/16/1999	[redacted]	Monthly Interest	Cash Receipt MONTHLY INTEREST EARNINGS DOCUMENT #[redacted]
7/14/1999	[redacted]	Monthly Interest	Cash Receipt MONTHLY INTEREST EARNINGS DOCUMENT #[redacted]
8/19/1999	[redacted]	Monthly Interest	Cash Receipt MONTHLY INTEREST EARNINGS DOCUMENT #[redacted]
9/16/1999	[redacted]	Monthly Interest	Cash Receipt MONTHLY INTEREST EARNINGS DOCUMENT #[redacted]
10/21/1999	[redacted]	Monthly Interest	Cash Receipt MONTHLY INTEREST EARNINGS DOCUMENT #[redacted]
11/18/1999	[redacted]	Monthly Interest	Cash Receipt MONTHLY INTEREST EARNINGS DOCUMENT #[redacted]
12/17/1999	[redacted]	Monthly Interest	Cash Receipt MONTHLY INTEREST EARNINGS DOCUMENT #[redacted]
1/24/2000	[redacted]	Monthly Interest	Cash Receipt MONTHLY INTEREST EARNINGS DOCUMENT #[redacted]
2/23/2000	[redacted]	Monthly Interest	Cash Receipt MONTHLY INTEREST EARNINGS DOCUMENT #[redacted]
3/17/2000	[redacted]	Monthly Interest	Cash Receipt MONTHLY INTEREST EARNINGS DOCUMENT #[redacted]
4/21/2000	[redacted]	Monthly Interest	Cash Receipt MONTHLY INTEREST EARNINGS DOCUMENT #[redacted]
5/18/2000	[redacted]	Monthly Interest	Cash Receipt MONTHLY INTEREST EARNINGS DOCUMENT #[redacted]
6/15/2000	[redacted]	Monthly Interest	Cash Receipt MONTHLY INTEREST EARNINGS DOCUMENT #[redacted]

DATE	AMOUNT	TRANSACTION DESCRIPTION	DOCUMENT REFERENCE (If calling, this information may be needed.)
7/20/2000	[redacted]	Monthly Interest	Cash Receipt MONTHLY INTEREST EARNINGS DOCUMENT #[redacted]
8/17/2000	[redacted]	Monthly Interest	Cash Receipt MONTHLY INTEREST EARNINGS DOCUMENT #[redacted]
9/6/2000	[redacted]	Monthly Interest	Cash Receipt MONTHLY INTEREST EARNINGS DOCUMENT #[redacted]
10/4/2000	[redacted]	Monthly Interest	Cash Receipt MONTHLY INTEREST EARNINGS DOCUMENT #[redacted]
11/3/2000	[redacted]	Monthly Interest	Cash Receipt MONTHLY INTEREST EARNINGS DOCUMENT #[redacted]
12/5/2000	[redacted]	Monthly Interest	Cash Receipt MONTHLY INTEREST EARNINGS DOCUMENT #[redacted]
12/31/2000	[redacted]	**BALANCE AT DECEMBER 31, 2000**	

Please note the ending balance is NOT THE CURRENT BALANCE of your IIM account. The account balance shown is for December 31, 2000 (the date through which the historical accounting was performed). If you have questions about this Historical Statement of Account, please call the Office of Historical Trust Accounting toll free (888) 329-5562. For account activity and balances after December 31, 2000, please refer to the quarterly Statements of Account. If you have questions about your quarterly Statements of Account or your current IIM account balance, please call the Office of Trust Funds Management toll free (888) 678-6836.

CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on January 8, 2003 I served the foregoing *Interior Defendants' Motion for Reconsideration of Order Prohibiting Communications with Class Members* by facsimile in accordance with their written request of October 31, 2001 upon:

Keith Harper, Esq.
Native American Rights Fund
1712 N Street, N.W.
Washington, D.C. 20036-2976
(202) 822-0068

Dennis M Gingold, Esq.
Mark Kester Brown, Esq.
1275 Pennsylvania Avenue, N.W.
Ninth Floor
Washington, D.C. 20004
(202) 318-2372

By U.S. Mail upon:

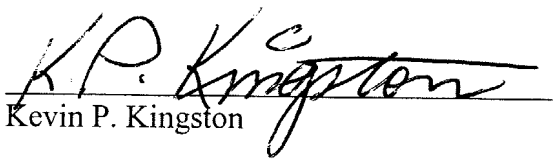
Elliott Levitas, Esq.
1100 Peachtree Street, Suite 2800
Atlanta, GA 30309-4530

By facsimile and U.S. Mail upon:

Alan L. Balaran, Esq.
Special Master
1717 Pennsylvania Avenue, N.W.
12th Floor
Washington, D.C. 20006
(202) 986-8477

By Hand upon:

Joseph S. Kieffer, III
Special Master Monitor
420 7th Street, N.W.
Apartment 705
Washington, D.C. 20004
(202) 478-1958



Kevin P. Kingston