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U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

INTERIOR DEFENDANTS' REPLY IN SUPPORT OF INTERIOR'S MOTION FOR ORDER PERMITTING THE PROVISION OF HISTORICAL STATEMENTS OF ACCOUNT TO CLASS COUNSEL

The Secretary of the Interior and the Assistant Secretary - Indian Affairs ("Interior Defendants," or "Interior") respectfully submit the following reply in support of Interior's Motion for Order Permitting the Provision of Copies of Historical Statements of Account to Class Counsel ("Interior's Motion"). To comply with the Privacy Act, 5 U.S.C. § 552a, Interior's Motion should be granted.

As described in Interior's Motion, Interior has prepared historical statements of account for approximately 7,900 Individual Indian Money ("IIM") account holders and is preparing to send them to the account holders as part of Interior's trust responsibility to these beneficiaries. In Interior's Motion, filed September 10, 2002, Interior sought an order granting Court permission to send these statements of account to Plaintiffs' counsel, citing Privacy Act concerns. On September 20, 2002, Plaintiffs filed an opposition to Interior's Motion ("Opposition").[1]

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[1] In the same paper containing the Opposition, Plaintiffs also moved for a temporary restraining order and a preliminary injunction ("TRO Motion") to prevent Interior from sending the statements of account to the account holders. Interior filed its opposition to the TRO Motion on September 23, 2002, and only addresses the Opposition to Interior's Motion in this reply.

Plaintiffs do not dispute that the statements of account contain information subject to the Privacy Act. Plaintiffs simply claim that existing orders of the Court already satisfy Privacy Act concerns and provide authority to send these statements to Plaintiffs' counsel. Interior believes that Plaintiffs are mistaken.

Under the Privacy Act "safe harbor" provision, 5 U.S.C. § 552a(b)(11),[2] Interior needs an order authorizing the production of information subject to the Privacy Act before such information can be sent to someone other than the individual for whom the information was prepared. The protective order of November 27, 1996 ("Protective Order"), cited by Plaintiffs (Opposition at 2), provides that after documents containing Privacy Act information are produced to Plaintiffs' counsel pursuant to an order the information will, or should, be handled as described in the Protective Order to maintain its confidentiality. The Protective Order itself does not provide the necessary authority to produce Privacy Act information. That is why the Protective Order was accompanied by an order dated the same day, the First Order for the Production of Information, also cited by Plaintiffs (Opposition at 2), that authorized the production of certain Privacy Act information, not including the information in the statements of account at issue here. In other words the existence of an order to maintain the confidentiality of Privacy Act information after its production – the Protective Order here – does not provide the necessary authority to produce Privacy Act information in the first place.

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[2] 5 U.S.C. § 552a(B)(11) provides: "No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be – pursuant to the order of a court of competent jurisdiction."

The other orders cited by Plaintiffs (Opposition at 2), the December 21, 1999 order and the September 17, 2002 order, reiterate Interior's obligation to complete an accounting, but do not provide the necessary specific authority for production of statements of account containing Privacy Act information to anyone other than the account holder. In short, under the Privacy Act, Interior needs an order from this Court granting it permission to send the statements of account to Plaintiffs' counsel. Interior's Motion should be granted.

Dated: September 26, 2002

Respectfully submitted,

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Assistant Attorney General
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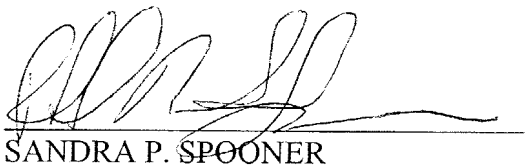
J. CHRISTOPHER KOHN
Director



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CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on September 26, 2002 I served the foregoing *Interior Defendants' Reply in Support of Interior's Motion for Order Permitting the Provision of Historical Statements of Account to Class Counsel* by facsimile, in accordance with their written request of October 31, 2001 upon:

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and by U.S. Mail upon:

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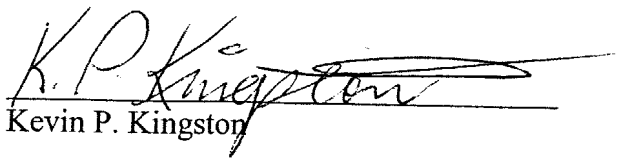

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