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 (TFH)
KEN SALAZAR, Secretary of the Interior, et al.,	)	
Defendants.	)	

PLAINTIFFS' REPLY TO DEFENDANTS' OPPOSITION TO MOTION FOR RECONSIDERATION OF NAMED PLAINTIFFS' EXPENSE APPLICATION

In their continuing effort to deny necessary relief to Elouise Cobell and other Class Representatives who have funded this litigation for the past 16 years, defendants improperly characterize plaintiffs' motion as one to alter or amend a judgment under F. R. Civ. P. 59(e). However, Rule 59(e) applies only to motions filed "after entry of the judgment." Judgment has not yet been entered in this case. A judgment must be set forth in a separate written order. *See* F. R. Civ. P. 58(a) ("Every judgment and amended judgment must be set out in a separate document"). A judgment is not entered for purposes of Rule 58 until either this Court "set[s] out [the judgment] in a separate document [] or 150 days have run from entry in the civil docket," whichever occurs first. *Id.* at 58(c)(2). *See generally One Cost Media, Inc. v. James*, 439 F. 3d 558, 561-62 (9th Cir. 2006). Neither has occurred here.

Prior to entry of judgment this Court may modify or alter its orders "as justice may require." *Judicial Watch v. Dep't of Army*, 466 F. Supp. 2d 112, 122 (D.D.C. 2006). Contrary to

the argument of defendants, this Court always retains inherent authority to correct or modify its decisions before entry of final judgment. *See Lemmons v. Georgetown Univ. Hosp.*, 241 F.R.D. 15, 21-22 (D.D.C. 2007). It is appropriate to grant such relief "when the Court has patently misunderstood a party . . . [or] has made an error not of reasoning but of apprehension." *Singh v. George Washington Univ.*, 383 F. Supp. 2d 99, 101 (D.D.C. 2005). That justice requires reconsideration of the order denying recovery by Class Representatives of their litigation expenses here is clear.[1]

Expense reimbursements that plaintiffs ask this Court to approve out of the common fund have been incurred by Class Representatives solely to prosecute this litigation. The terms of settlement expressly contemplate payment of such expenses out of the common fund and authorize this Court to approve such payment. In addition, notice regarding their nature and scope was approved by this Court and duly presented and carefully explained to class members, none of whom objected to reimbursement out of the common fund on grounds that this Court does not have the authority to make the award. Indeed, there is no authority that bars this Court from approving the requested reimbursements out of the common fund and indeed such reimbursement is customary in class action litigation. Defendants have cited to no contrary caselaw and they cannot contest this settled point. Most importantly, without the expenditure of funds directly raised by Ms. Cobell and through the Blackfeet Reservation Development Fund, no class member would have obtained any measure of justice and no historical settlement could have been achieved.

[1] Importantly, even if this Court applies the standard for reconsideration of a judgment under Rule 59(b), this motion should be granted as "manifest injustice" plainly would result to the Class Representatives.

As this Court knows well, defendants are paying no part of the requested reimbursements. Plaintiffs are and they understand why it is important to them to do so. Therefore, although plaintiffs concede that defendants' opposition is a clever defense strategy, the denial of litigation costs and expenses out of the common fund will convert trust duties to a legal fiction because individual Indians cannot underwrite litigation as complex and protracted as this. As such, never again will they be able to enforce duties they are owed by the United States. That would be a travesty of justice and it would undermine everything achieved by Ms. Cobell and the other Class Representatives in these proceedings as well as the extraordinary efforts of this Court.

Furthermore, plaintiffs' timely and carefully documented petition for Class Representative expenses stands in stark contrast to the untimely fee applications of the Native American Rights Fund and Mark Kester Brown – attorneys who have not represented plaintiffs in these proceedings or before Congress for upwards of six years. They are not Class Counsel; they have disengaged from these proceedings for several years; their fees are not contemplated by, or included within, the Settlement Agreement; and plaintiffs vigorously oppose them. Nor, because of the untimely and inappropriate nature of their requests, was notice provided to the plaintiff classes. Yet, out of the common fund, this Court has reserved funds, and is considering an award to them from funds it has so reserved. However, to award any fees and expenses to such attorneys at the same time Class Representative costs and expenses are denied would be irreparably harmful and adverse to the interests of class members because it would support the government's efforts to mitigate, if not wholly eliminate, its litigation risk for future breaches of trust, claims that are not settled for class members, and claims of individual Indian trust

beneficiaries who are not included within the scope of this settlement. That is in a word, inequitable.

In short, nothing in defendants' opposition to plaintiffs' motion for reconsideration changes the basic underlying fact that is would be unfair to not cover the cost of litigation from the common fund. Nor do we think this Court intended to place Ms. Cobell and the other class representatives in precarious financial positions. That is all plaintiffs' respectfully request this Court consider by this motion.

Respectfully submitted this 15th day of July 2011.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing PLAINTIFFS' REPLY TO DEFENDANTS OPPOSITION TO MOTION FOR RECONSIDERATION OF NAMED PLAINTIFFS' EXPENSE APPLICATION was served on the following via facsimile, pursuant to agreement, on this day, July 15, 2011.

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