[ORAL ARGUMENT SCHEDULED ON FEBRUARY 16, 2012]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ELOUISE PEPION COBELL, *et al.*, Plaintiffs-Appellees, KIMBERLY CRAVEN, Objector-Appellant, v. KENNETH LEE SALAZAR, Secretary of the Interior, *et al.*, Defendants-Appellees.	No. 11-5205

DEFENDANTS-APPELLEES' RESPONSE TO
OBJECTOR-APPELLANT'S 12/13/11 MOTION FOR JUDICIAL NOTICE

Defendants-Appellees, Secretary of the Interior Ken Salazar, *et al.*, hereby respond to Objector-Appellant Kimberly Craven's December 13, 2011 motion for judicial notice of the government's opposition to a motion for class certification filed in *Two Shields* v. *United States* (Fed. Cl. Case No. 11-531L). The December 13 motion is Craven's second motion for judicial notice of the filings in *Two Shields*.

Two Shields is a putative class action in the Court of Federal Claims. The plaintiffs in that case, as in the Trust Administration Class in this case, allege that the government breached fiduciary duties in the management of Indian trust assets. As

noted in Craven's first motion for judicial notice, the government has filed a motion to dismiss in that case. See Craven's motion, Dec. 1, 2011; see also Government's response, Dec. 15, 2011. The government has also opposed the *Two Shields* plaintiffs' motion for class certification under Rule 23 of the Court of Federal Claims, on the basis that plaintiffs failed to establish that their action meets Rule 23's requirements of commonality and typicality. The government's opposition to the class certification is the subject of Craven's latest motion for judicial notice.

Defendants take no position on Craven's latest judicial notice motion or whether its untimeliness should be excused. However, defendants object to Craven's speculation that the government's argument under Rule 23 in *Two Shields* "is necessarily a concession that the larger Trust Administration Class cannot be certified because of the lack of commonality." Mot. 2. That assertion is both misleading and incorrect, because Congress expressly *exempted* the Trust Administration Class from Fed. R. Civ. P. 23 for purposes of class certification. See Claims Resolution Act of 2010 ("CRA") § 101(d)(2)(A), Pub. L. No. 111-291, 124 Stat. 3064 ("Notwithstanding the requirements of the Federal Rules of Civil Procedure," the court "may certify the Trust Administration Class"). Thus there is absolutely no inconsistency between (1) the government's argument that the Trust Administration Class was properly certified as part of the *Cobell* settlement, and (2) its argument in

Two Shields that a related class there, which *is* subject to Rule 23, cannot be certified.

Nowhere in her motion for judicial notice does Craven acknowledge the Claims Resolution Act or that Federal Rule of Civil Procedure 23 does not govern the Trust Administration Class. Instead, she apparently maintains the position expressed in her opening brief (Br. 42-45) that all the requirements of Rule 23 are necessarily "of constitutional magnitude," such that Congress may not permissibly legislate around Rule 23, as it did for the Trust Administration Class. But it is clear that due process "does not compel * * * any particular rule for establishing the conclusiveness of judgments in class suits, nor does it compel the adoption of the particular rules thought * * * to be appropriate for the federal courts." *Hansberry* v. *Lee*, 311 U.S. 32, 42 (1940). Thus, Congress wields "ultimate authority over the Federal Rules of Civil Procedure; it can create exceptions to an individual rule as it sees fit – either by directly amending the rule or by enacting a separate statute overriding it in certain instances." *Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 130 S. Ct. 1431, 1438 (2010); see also *Lassiter* v. *Dep't of Soc. Servs.*, 452 U.S. 18, 33 (1981) (a legislature may require as a matter of "wise public policy" more process than what is "minimally tolerable under the Constitution"). Accordingly, the Trust Administration Class may be certified consistent with due process even if a class such as the putative one in *Two Shields* may not be certified consistent with Rule 23.

In the context of a class action for individualized damages, due process requires at most that class members be afforded adequate notice, an opportunity to be heard, a right to opt out, and adequate representation. See *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 811-12 (1985). As explained in our brief (at 44-51) filed in this case on December 16, 2011, those requirements are fully satisfied here.

Craven's attempt to draw a "concession" from the government's opposition to class certification in *Two Shields* — that class certification was improper in the *Cobell* settlement — is both misleading and based on a flawed legal premise. The government's position in *Two Shields* is irrelevant to this case, and it does not bear on the question whether the district court was within its discretion to approve the Congressionally-ratified *Cobell* class settlement here.

Respectfully submitted,

s/ Thomas M. Bondy
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CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2011, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the District of Columbia Circuit using the CM/ECF system, which will send notification of such filing to counsel of record.

s/ Adam C. Jed
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