

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

FORT HALL LANDOWNERS)	
ALLIANCE, INC., ELI MOSHO,)	Case No. CV-99-052-E-BLW
and FRANK PAPSE, SR.,)	
)	MEMORANDUM DECISION
Plaintiffs,)	AND ORDER
)	
v.)	
)	
BUREAU OF INDIAN AFFAIRS,)	
UNITED STATES DEPARTMENT)	
OF THE INTERIOR, and BRUCE)	
BABBITT, Secretary, U.S.)	
Department of the Interior)	
)	
Defendants.)	
_____)	

INTRODUCTION

The Court has before it Plaintiffs’ Renewed Motion to Substitute Class Representatives (Docket No. 262). For the reasons expressed below, the Court will grant the motion.

BACKGROUND

The Court has fully discussed the background of this matter in previous

Memorandum Decisions and Orders, (Docket Nos. 146, 166 and 219). As such, the Court will only review the factual and procedural matters that are pertinent to this motion.

Plaintiffs' lawsuit was brought under the Privacy Act, 5 U.S.C. §552a(b). The class was conditionally certified by the Court on August 20, 2000, and was originally deemed to include "all owners of trust land on the Fort Hall Indian Reservation who had their names, addresses, and ownership information disclosed by the Defendants in violation of the agency's federal regulations and the Privacy Act."

For purposes of deciding this motion, it is important to note two aspects of Plaintiffs' case that have changed over time. First, Plaintiffs previously alleged that Defendants had violated the Freedom of Information Act (FOIA) and had breached their trust responsibilities. Both of those claims have now been dismissed, and Plaintiffs are only pursuing the Privacy Act claim.

Second, the Court originally named the Fort Hall Landowners Alliance, Inc., Eli Mosho and Frank Papse, Sr., as the class representatives. The parties later stipulated to the dismissal of the Alliance and Mr. Mosho. Frank Papse, Sr. is currently the only class representative.

On March 14, 2003, the Court denied, without prejudice, Plaintiff's request

to allow the following individuals to serve as class representatives: Ernestine Werelus, Alene Auck Menta, Wilverna Covington, Althea Wetchie, Lee Stone, Twila Pahvitse Bear, Lee Bear, Nino Bear, and Inez Preacher (“Proposed Representatives”). In that decision, the Court found that the criteria required by Rules 23(a)(3) and (4) were not satisfied. The Court concluded that to meet those criteria Plaintiffs must allege that the proposed class representatives suffered an actual injury that resulted from specific Privacy Act violations, and must demonstrate that the individual Plaintiffs would “fairly and adequately protect the interests of the class.” That standard continues to govern Plaintiffs’ renewed motion.

ANALYSIS

Under Rule 23, the Court’s class certification order may be amended at any time prior to a decision on the merits. Fed. R. Civ. P. 23(c)(1). Amending an order to substitute class representatives is, therefore, authorized by Rule 23(c)(1). *See Robinson v. Sheriff of Cook County*, 167 F.3d 1155, 1158 (7th Cir. 1999); 1 *Newberg on Class Actions* §2.26 (3d ed. 1992).

1. Rule 23(a)(3) – Typicality

In order to satisfy the typicality requirement of Rule 23(a)(3), Plaintiffs must demonstrate that the claims of an individual plaintiff seeking to act as class

representative are typical of the claims of the class. *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977). “[A] class representative must be part of the class and possess the same interest and suffer the same injury as the class members.” *Id.* (internal quotation marks omitted). Under the Rule’s permissive standards “representative claims are ‘typical’ if they are reasonably co-extensive with absent class members; they need not be substantially identical.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998); *see also Thomas & Thomas Rodmakers Inc. v. Newport Adhesives and Composites*, 209 F.R.D. 159, 165 (C.D. Cal. 2002)(typicality is a “low threshold” requirement). The Ninth Circuit has added that the Court should resolve questions of typicality by examining “whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct.” *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992).

Defendants argue that the Court should deny Plaintiffs’ renewed motion to substitute class representatives because it fails to provide any new information or detail any specific violations of the Privacy Act. It is true that the Plaintiffs have not submitted new information, but they did identify allegations in their Second Amended Complaint and Declarations that they failed to identify for the Court

previously.

Those pleadings allege (1) that the Proposed Representatives are owners of trust land on the Fort Hall Indian Reservation, (2) that their names, addresses, and land ownership information was disclosed by Defendants to Idaho Power in violation of the Privacy Act, and (3) that this violation caused injury by allowing Idaho Power to contact owners directly to obtain their consents, thereby prejudicing the owners in their ability to obtain full value for the easements.

These allegations supply the necessary detail. The Court therefore finds that the typicality requirements of Rule 23(a)(3) are satisfied.

Defendants further argue that the Court should deny Plaintiffs' renewed motion even if the Proposed Representatives have pled specific Privacy Act violations. This argument is based on the assertion that the Proposed Representatives' alleged injuries are inextricably tied to Plaintiffs' breach of trust responsibility claim, which has been dismissed from this action.

Again, the Court disagrees. The Plaintiffs have alleged a Privacy Act violation and consequent injury. This is a separate claim from the breach of trust claim, and was pled as such. Whether Plaintiffs will be able to prove their Privacy Act claim is an issue that strikes at the merits of Plaintiffs' case. Because it is inappropriate for the Court to look beyond Plaintiffs' allegations at this time, the

Court declines to do so. *Blackie v. Barrack*, 524 F.2d 891, 901 (9th Cir. 1975).

For these reasons, the Court finds that Plaintiffs have satisfied Rule 23(a)(3).

2. Rule 23(a)(4) – Adequacy

The adequacy of representation requirement is closely linked to that of typicality and commonality, and the criteria “tend to merge.” *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 626 n.20 (1997). The purpose of the adequacy requirement is to ensure that the interests of the class members will be fairly, adequately, and competently protected by the class representatives and by class counsel. *Windsor*, 521 U.S. at 625. Accordingly, the Ninth Circuit requires that the Proposed Representatives demonstrate two things. First, they must show that neither they nor their counsel have conflicts of interest with the other class members. *Hanlon* 150 F.3d at 1020. Second, they must demonstrate that they and their counsel will prosecute the action vigorously on behalf of the class. *Id.*

Here, Plaintiffs argue that the Proposed Representatives have no conflicts of interest and are ideally situated to vigorously prosecute the action. Plaintiffs contend that the same allegations that satisfy the typicality criteria also satisfy the adequacy of representation criteria. The Court agrees.

As stated above, the Court finds the Proposed Representatives’ claims to be co-extensive with those of the other class members. Any differences between the

Proposed Representatives' claims and those of other class members will be minimal and will not raise conflicts of interests. Moreover, the Court finds that because the Proposed Representatives' claims are typical of and common to the claims of the class members, the Proposed Representatives are in an ideal position to vigorously prosecute the claims on behalf all class members, and have every incentive to do so.

The Proposed Representatives also assert that their counsel meets the criteria of Rule 23(a)(4). Their counsel has significant class action experience and is competent to represent the entire class in this matter. The Court found this to be true when it certified the class in its Memorandum Decision and Order dated December 20, 2000. There is nothing in the record to indicate that counsel's representation of the Proposed Representatives will create a conflict of interest between counsel and the other class members; nor does the record reflect that such representation will diminish counsel's ability or will to prosecute the action vigorously on behalf of the entire class. For these reasons, the Court continues to find that counsel meets the adequacy of representation requirement of Rule 23(a)(4).

ORDER

In accordance with the Memorandum Decision set forth above,

NOW THEREFORE IT IS HEREBY ORDERED that Plaintiffs' Renewed Motion to Substitute Class Representatives (Docket No.262) is GRANTED.

DATED: **July 29, 2005**



A handwritten signature in black ink, reading "B. Lynn Winmill". The signature is written over a horizontal line.

B. LYNN WINMILL

Chief Judge

United States District Court